90-1325

No.

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1990

UNELKO CORP., an Arizona corporation, and HOWARD G. OHLHAUSEN, an individual,

Petitioners,

v.

ANDY ROONEY, an individual, and CBS, INC., a New York Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit repudiate this Court's decision in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990), by *sua sponte* finding that a broadcast statement implies only the speaker's subjective meaning, while ignoring that the statement implies objective facts which can be proven false and defamatory?

2. When this Court reverses the law on which a district court relied in granting summary judgment, does due process mandate that the case be remanded to enable the parties to develop a complete factual record in light of the intervening change in law?

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Unelko Corp.[1] and Howard G. Ohlhausen respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on November 20, 1990.

[1] Unelko Corp. is a privately owned Arizona corporation which has no parent or subsidiary company.

OPINIONS BELOW

The August 24, 1990, decision of the United States Court of Appeals for the Ninth Circuit is published at 912 F.2d 1049 (9th Cir. 1990) (Appendix A). The April 25, 1989, Order of the United States District Court for the District of Arizona is not published (Appendix B).

JURISDICTION

The decision of the Ninth Circuit was filed on August 24, 1990. A petition for rehearing with a suggestion for rehearing *en banc* was denied on November 20, 1990 (Appendix C). This Petition was filed within 90 days of that date. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

A. Introduction—The Ninth Circuit Rejects *Milkovich*.

This case is about product defamation by CBS and Andy Rooney on "60 Minutes." It also concerns a follow-up broadcast of "60 Minutes" involving additional false assertions and the ridicule of Petitioners' recourse to the federal court.

The present petition results from the Ninth Circuit's decision affirming the District Court's determination that a false national television "pronouncement . . . that a product does not work"[2] is protected "opinion," in derogation of this Court's decision in *Milkovich v. Lorain Journal Co.*[3] In rejecting *Milkovich*, the Ninth Circuit also compromised Petitioners' Seventh Amendment right to a jury trial.

B. The Initial Broadcast—Rooney And CBS Proclaim That The Efficacious Rain-X Product Does Not Work.

On the April 17, 1988, broadcast of "60 Minutes," Andy Rooney did a feature on "junk." During this "junk" segment, Rooney displayed Rain-X and stated:

> Here's something for the windshield of your car called Rain-X. The fellow who makes this sent me a whole case of it. He's very proud of it. I actually spent an hour one Saturday putting it on the windshield of my car. I suppose he'd like a commercial or a testimonial. You know how they hold the product up like this? [holding product up next to his face] *It didn't work.*

Virtually every aspect of Rooney's broadcast statement was admittedly false,[4] and his assertion that Rain-X does not work is at the heart of this proceeding.

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[2] Pet. App. B-1 (April 25, 1989, Order of Judge Broomfield).

[3] 110 S. Ct. 2695 (1990).

[4] Rooney admittedly did not spend an hour applying Rain-X to the windshield of one of his cars, and he changed his testimony concerning which car he allegedly treated. Finally, Rooney was also impeached on the critical issue of when he allegedly applied Rain-X.

C. Unelko Files Suit And CBS/Rooney Immediately Respond With A Further Defamatory Broadcast.

On May 4, 1988, Petitioners filed their Complaint against Rooney and CBS for defamation, product disparagement, and tortious interference with business relationships.[5] Petitioners alleged that Rooney and CBS maliciously broadcast false and defamatory statements about Rain-X on April 17 and caused substantial damage to Petitioners' business and reputation.

Four days later, during their May 8 broadcast, CBS/Rooney compounded the April 17 defamation. Recognizing the defamatory implication of his segment on Rain-X and the pejorative "junk" label he had used, Rooney changed his defamatory statement from "It didn't work" to "It didn't work for me."[6] The May 8 broadcast also ridiculed the federal court litigation brought by Petitioners.

D. CBS/Rooney Invoke The First Amendment—They File A Motion For Summary Judgment On The Ground That The Defamatory CBS/Rooney Statements Are Immune From Liability As "Opinion."

Rooney and CBS moved for summary judgment on December 5, 1988. In the memorandum in support of their

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[5] The Complaint was filed in the United States District Court for the District of Arizona, pursuant to that court's diversity jurisdiction under 28 U.S.C. § 1332.

[6] The May 8 broadcast also contained false statements of fact, and the context of the broadcast demonstrates that it was intentionally crafted to further ridicule and arrogantly defame Petitioners and their legitimate recourse to the legal process. Accordingly, Petitioners were granted leave to amend their Complaint to assert additional claims for relief stemming from this further broadcast.

motion, CBS and Rooney asserted that Rooney's false statements were protected "opinion" and not actionable as a matter of law. In summarizing their argument, Respondents stated:

> A long line of federal and state cases firmly establishes that under the First Amendment there can be no liability for the expression of one's opinion. These cases identify the factors that distinguish statements of opinion from statements of fact. As demonstrated below, those factors are present here; Andy Rooney was expressing his opinion when he commented on Rain-X. Accordingly, as a matter of law, no liability can attach to Rooney's statements and defendants' motion for summary judgment should be granted.[7]

On February 6, 1989, Petitioners filed their brief in opposition to Respondents' motion for summary judgment. Petitioners disputed the CBS/Rooney thesis that "opinion" is protected. In so doing, Petitioners argued that there is simply no justification for extending constitutional protection to statements falsely condemning a consumer product.

CBS and Rooney filed their Reply on February 27, 1989. Again, the thesis propounded by CBS/Rooney was that Rooney's statement was protected "opinion."

E. Summary Judgment Is Granted Because The Trial Court Erroneously Concludes That Rooney's Statement That "Rain-X Does Not Work" Is Protected Opinion.

Judge Broomfield's order of April 25, 1989, granted Respondents' motion for summary judgment. The trial

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[7] Memorandum In Support Of Defendants' Motion For Summary Judgment at 5-6.

judge ruled that Rooney had declared that Rain-X does not work. The dispositive issue was stated by the trial court as follows:

> [W]hether a well-known humorist and social commentator's pronouncement on national television *that a product does not work* subjects him and his network to liability to the product manufacturer for defamation, product disparagement and tortious interference with business relationships.[8]

Judge Broomfield then erroneously granted Respondents' motion on the basis that Rooney's statement was protected "opinion."

F. The Ninth Circuit Specifically Finds That Rooney's Statement Implied Assertions Of Objective Facts.

Ohlhausen and Unelko filed their notice of appeal on May 24, 1989. In their appellate briefs, the parties continued to dispute whether Rooney's statement was protected as "opinion." After this Court decided *Milkovich*, the Ninth Circuit requested additional briefing. Respondents argued that notwithstanding *Milkovich*, Rooney's statement remained immune from a defamation action as pure opinion. Petitioners argued that Rooney's statement was clearly actionable under *Milkovich* because it implied false assertions of objective fact (i.e., the "product does not work"), just as the trial court had found. Accordingly, Petitioners requested that the Ninth Circuit remand the action to the District Court for proceedings consistent with that decision. Such a remand was mandated because the parties had not developed the factual record made relevant by *Milkovich* (e.g., that Rain-X does work).

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[8] Pet. App. B-1 (April 25, 1989, Order of Judge Broomfield) (emphasis supplied).

On August 24, 1990, the Ninth Circuit affirmed the District Court's grant of summary judgment. As a threshold matter, the Ninth Circuit agreed with Petitioners and found that a reasonable fact finder could conclude that Rooney's statement implied an assertion of objective fact.[9] The Court noted that "[w]hether Rain-X repels rain, facilitates window cleaning, and increases visibility are all capable of being proved true or false."[10] Indeed, this is precisely the inquiry mandated by *Milkovich* and which the Ninth Circuit should have allowed Unelko to develop on remand.

G. The Ninth Circuit Rejects *Milkovich*—It Ignores What Rooney's Statement Implied To The Trial Court And Viewers, And Instead "Assume[s]" That The Statement Only Implied That Rain-X Did Not Work For Rooney.

Despite the ease of objectively determining that Rain-X works, the Ninth Circuit *sua sponte* limited its consideration to whether Rain-X had worked for Rooney. Thus, the Court of Appeals rejected the central holding of *Milkovich* and focused on Rooney's after-the-fact and self-serving interpretation, as well as its own assumption of what was meant by his defamatory statement.[11] Despite the mandate of this Court in *Milkovich*, the Ninth Circuit determined that Unelko had failed to prove that "Rain-X worked for Rooney," and affirmed the grant of summary judgment.

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[9] *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1055 (9th Cir. 1990).

[10] *Id.*

[11] *Id.* at 1056.

Ohlhausen and Unelko's Petition for Rehearing with a Suggestion of Rehearing *En Banc* was denied on November 20, 1990. This Petition for Writ of Certiorari follows:

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit Rejected *Milkovich* And Violated Petitioners' Seventh Amendment Rights.

1. Under *Milkovich*, The Dispositive Inquiry Is Whether A Statement Implies Defamatory Facts To A Reasonable Fact Finder.

Prior to this Court's decision in *Milkovich*,[12] many courts erroneously read into *Gertz v. Robert Welch, Inc.*,[13] a blanket defamation exemption for statements deemed to be "opinion."[14] In *Milkovich*, this Court eliminated the "artificial dichotomy between 'opinion' and fact"[15] because "expressions of 'opinion' may often imply an assertion of objective fact."[16] This Court reasoned that:

> Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement,

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[12] *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990).

[13] 418 U.S. 323 (1974).

[14] *See Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 880 (9th Cir.), *cert. denied*, 489 U.S. 1080 (1989); *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983).

[15] *Milkovich*, 110 S. Ct. at 2706.

[16] *Id.* at 2705.

> "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."[17]

The dispositive inquiry in a defamation case must focus on whether a reasonable fact finder can conclude that the speaker's statements imply some defamatory assertion of fact.[18] Under *Milkovich*, the statement need not expressly articulate a defamatory fact; rather, the statement need only imply, connote, or create the impression of a defamatory fact in the mind of a reasonable juror.[19] Other courts applying *Milkovich* have correctly examined the reasonable implications of statements, not the speaker's self-serving interpretations.[20]

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[17] *Id.*

[18] *Id.* Indeed, even the dissenting justices agreed that "[t]he operative question remains whether reasonable readers would have actually interpreted the statement as implying defamatory facts." *Id.* at 2710 n.3 (Brennan, J., dissenting).

[19] *Id.* at 2704-05 and 2708.

[20] *See Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 783 (S.D.N.Y. 1990) (must examine whether statement "reasonably implies factually verifiable content"); *Foretich v. Glamour*, Civ. A. No. 89-3099, memorandum at 10 (D.D.C. Oct. 5, 1990) (1990 WL 213058)(court must investigate whether statement "implies a false statement of fact which a reasonable fact finder would perceive"); *West v. Bond Univ. Ltd.*, Nos. C-89-20674 RFP, C-89-20673 RFP, op. at 3 (N.D. Cal. Nov. 8, 1990) (1990 U.S. Dist. LEXIS 15186) ("the central inquiry is whether a reasonable fact finder could conclude that the statements . . . assert or imply something which could be proved false").

For example, in *White v. Fraternal Order of Police*,[21] defendants were sued for revealing details of a sequence of events involving plaintiff's drug tests and his promotion within the police department. The court examined the aggregate defamatory implication that plaintiff used illegal drugs and concluded that under *Milkovich*, it implied objectively verifiable facts.[22]

Thus, *Milkovich* stands for the proposition that when a speaker states that "In my opinion Jones is a liar," the proper inquiry is how a reasonable juror would interpret that statement—i.e., that Jones is a liar. If Jones can demonstrate that he is not a liar, it is irrelevant that the speaker may still think that Jones is a liar.[23]

2. The Ninth Circuit Violated *Milkovich* By Ignoring The Objectively Verifiable Facts That Rooney's Statement Implied To The Reasonable Viewer.

The Ninth Circuit's opinion in this case simply rejects the standard enunciated by this Court in *Milkovich*. The Ninth Circuit's approach repudiates *Milkovich* by limiting the potential facts implied by Rooney's statement to Rooney's after-the-fact and self-serving version. However, *Milkovich* mandates that a statement is actionable if it implied any objectively verifiable defamatory fact to a reasonable fact finder. In direct contravention of *Milkovich*, the Ninth Circuit relied on Rooney's deposition testimony in holding that Rooney's statement could imply only that Rain-X did not work for Rooney. But the average viewer can react only

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[21] 909 F.2d 512 (D.C. Cir. 1990).

[22] *Id.* at 522-23.

[23] *Milkovich*, 110 S. Ct. at 2706 n.7. Whether the speaker thinks Jones is a liar is relevant only to the issue of malice.

to what Rooney actually said and implied during the broadcast. As the trial court found, Rooney's statement was that "Rain-X doesn't work." Under *Milkovich*, this clear implication cannot be ignored as it was by the Ninth Circuit.

Indeed, both the trial court *and* viewers who wrote to CBS/Rooney interpreted Rooney's statement to mean that Rain-X does not work. Thus, the trial court characterized Rooney's statement as a "pronouncement . . . that [Rain-X] does not work."[24] The numerous letters from viewers who wrote to "60 Minutes" after the broadcast also vigorously challenged Rooney's defamatory conclusion and emphatically told both CBS and Rooney that Rain-X does work.[25]

3. The Ninth Circuit's Repudiation Of *Milkovich* Resurrected The Blanket "Opinion" Exemption Rejected By This Court.

The Ninth Circuit's misapplication of *Milkovich* impermissibly recreates the artificial fact/opinion dichotomy rejected by this Court.

In *Unelko*, the Ninth Circuit limited its analysis of Rooney's statement to what the speaker subsequently testified he intended, rather than analyzing what he actually stated and implied on the broadcast. This is contrary to this Court's teachings in *Milkovich*. Under *Milkovich*, the rele-

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[24] Pet. App. B-1 (April 25, 1989, Order of Judge Broomfield).

[25] (1) "I have used Rain-X ever since it was first shown to me by another user. . . . Let me assure Andy Rooney and all of you It Works!;" (2) "I do use [Rain-X] regularly and, not only does it work, I consider it one of the three or four most significant new products to come on the market in years . . . this product works miraculously;" (3) "Rain-X works;" (4) "you owe the inventor an apology;" and (5) "if I were Rain-X I'd sue you."

vant inquiry is whether "Jones is a liar," whether White is a drug user, and whether Rain-X *does* work. Rooney's after-the-fact subjective reaction to Rain-X is totally irrelevant to the inquiry mandated by *Milkovich*. When the Ninth Circuit failed to consider what facts would be implied to reasonable jurors, it eviscerated the very principles sought to be upheld by *Milkovich*.

4. Unelko Is Entitled To Have A Jury Determine Whether Rooney's Statements Implied A Defamatory Meaning.

In a defamation action, the court must determine in the first instance whether a statement is "capable of conveying a defamatory meaning."[26] If the court determines that a statement does contain material capable of defamatory meaning, "a jury must determine whether such meaning was attributed in fact."[27]

The District Court judge and reasonable viewers found that Rooney's statements implied that Rain-X does not work. It is indisputable that this meaning, albeit ignored by the Ninth Circuit, is capable of being understood as defamatory by reasonable fact finders. Accordingly, Unelko is entitled to have a jury determine whether Rooney's statements were defamatory.

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[26] *Southern Air Transp., Inc. v. American Broadcasting Cos.*, 877 F.2d 1010, 1013-14 (D.C. Cir. 1989).

[27] *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990). *See also Restatement (Second) of Torts* § 614 (1977) (court determines whether defamatory meaning is possible; jury determines whether defamatory meaning was understood).

B. When This Court Rejects The Precise Theory On Which A District Court Relied In Granting Summary Judgment And Renders The Existing Record Irrelevant, Due Process Entitles The Parties To Develop A Factual Record In Light Of The New Controlling Law.

It is axiomatic that parties pursue discovery and develop a factual record predicated on the controlling law. When this Court reverses the prevailing law, due process requires that the parties be provided the opportunity to pursue discovery and develop a factual record in light of the new law.[28]

For example, in *Heirs of Fruge v. Blood Services*,[29] the trial court granted summary judgment in favor of the defendant solely because charitable institutions were immune from suit in tort under Louisiana law. While the plaintiff's appeal was pending, the Louisiana Supreme Court reversed the existing law and held that charities were not immune from suit in tort. The defendant, although acknowledging this change in law, urged the Fifth Circuit to affirm the summary judgment on the independent ground that no negligence had been shown.

The Fifth Circuit refused to do so. The court found that the sole issue presented by the summary judgment motion was the doctrine of charitable immunity. Accordingly, no other Rule 56 materials had been submitted. The court reasoned that:

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[28]*See Fountain v. Filson*, 336 U.S. 681, 683 (1949) (An appellate court may not extend a summary judgment to an issue not considered by the trial court when it would deprive the losing party of an opportunity to "dispute the facts material to [that] claim.").

[29]506 F.2d 841 (5th Cir. 1975).

> Where summary judgment is granted on one issue, an appellate court may not extend that judgment to another issue under the guise of affirming the "result below" when the effect is to preclude the losing party from "disput[ing] facts material to that claim."[30]

Similarly, the District Court's grant of summary judgment to Rooney and CBS was explicitly premised on the fact/opinion distinction made obsolete by this Court in *Milkovich*. Despite the intervening change in law, the Ninth Circuit affirmed the District Court's judgment on independent grounds by "assum[ing]" Rooney's statement could only imply something entirely different from what it implied to the District Court and to the many viewers who wrote to CBS/Rooney. Implicit in the Ninth Circuit's ruling "is the holding that the petitioner, although having no occasion to do so under the District Court's erroneous construction of the [law], was not entitled to an opportunity to meet the respondent's case under the correct interpretation."[31] This result is clearly improper.

When the Supreme Court reverses the authority on which a district court relied, "the underpinnings of the district court's decision [is] shaken."[32] Accordingly, it is the district court which should determine in the first instance if new evidence is material under a revised legal standard.[33] As the Arizona Supreme Court has stated:

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[30]*Id.* at 844 (*quoting Fountain v. Filson*, 336 U.S. 681, 683 (1949)).

[31]*Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 531 (1958).

[32]*Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989).

[33]*United States v. Walgren*, 885 F.2d 1417, 1428 (9th Cir. 1989).

> It is one thing to engage in a constitutionally mandated, independent review of the evidence to see if it supports a verdict which otherwise will stand; it is a different thing, having reversed the verdict for error of law, to determine whether the evidence is sufficient to permit the case to go to trial at all. While the difference may be subtle, the seventh amendment right to a jury trial in federal cases is implicated.[34]

We respectfully submit that the Ninth Circuit should have remanded this action for further proceedings in the District Court to afford Petitioners the opportunity to develop a complete factual record in response to a correct application of the *Milkovich* holding as adopted by this Court.[35]

CONCLUSION

The Ninth Circuit's decision creates a precedent that is an erroneous and extreme departure from this Court's holding in *Milkovich*. It is also inconsistent with the ruling of every other court which has applied *Milkovich*. In addition, the Ninth Circuit's inappropriate refusal to remand this case to allow Unelko to develop a relevant factual record in light of the intervening change in the law has compromised Petitioners' Seventh Amendment rights, and, we respectfully submit, calls for an exercise of this Court's power of supervision. Petitioners respectfully submit that this immediate and drastic departure from *Milkovich* should not be

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[34] *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 486, 724 P.2d 562, 572 n.5 (Ariz. 1986).

[35] *Heirs of Fruge*, 506 F.2d at 849 (When a party has been denied the opportunity to develop a complete factual record in light of an intervening change in law, "the proper resolution of the appeal is not affirmance but remand.").

permitted to stand, and that their Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED, this 19th day of February 1991.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNELKO CORP., an Illinois corporation, and HOWARD G. OHLHAUSEN, *Plaintiffs-Appellants,* v. ANDY ROONEY, an individual, and CBS, INC., *Defendants-Appellees.*	No. 89-15751 D.C. No. CV-88-0705-PHX-RC OPINION

Appeal from the United States District Court
for the District of Arizona
ROBERT C. BROOMFIELD, *District Judge, Presiding*

Argued and Submitted
July 20, 1990—San Francisco, California

Filed August 24, 1990

Before: ARTHUR L. ALARCON AND CECIL F. POOLE, *Circuit Judges*, and TERRY J. HATTER, *District Judge**

OPINION BY JUDGE ALARCON

SUMMARY

Torts/Constitutional Law

Affirming the district court's grant of summary judgment, the court of appeals held that the threshhold question in defamation suits is not whether a statement might be

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* Honorable Terry J. Hatter, United States District Judge for the Central District of California, sitting by designation.

labeled opinion, but whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact.

Appellants Unelko Corporation and Howard G. Ohlhausen appealed from an order dismissing their defamation claim against appellees Andy Rooney and CBS, Inc. The suit arose from statements made by Rooney during the April 17 and May 8, 1988 broadcasts of "60 Minutes," among which was the assertion that Unelko's product "Rain-X" "didn't work." The district court granted summary judgment in favor of Rooney, finding that Rooney's statement that Rain-X "didn't work" was protected as opinion and that Unelko had failed to raise a triable issue of fact as to whether any of Rooney's statements were false and defamatory.

[1] Relying on a significant body of Ninth Circuit case law, the district court found that Rooney's statement that Rain-X "didn't work" was opinion and thus exempt from liability. However, the cases on which the district court relied have all been effectively overruled by the Supreme Court's recent opinion in *Milkovich v. Lorain Journal Co.*, NO. 89-645, slip op. ____ (U.S. June 21, 1990), in which the Court rejected the view that an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the first amendment. Thus the threshold question in defamation suits is not whether a statement might be labeled opinion, but rather whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact.

[2] In order to determine whether Rooney's statement could be viewed as implying an assertion of fact, the court analyzed whether Rooney used figurative or hyperbolic

language that would negate the impression that he was seriously maintaining that Rain-X did not perform effectively; whether the general tenor of Rooney's segment of "60 Minutes" negated this impression; and whether the assertion that a product works is susceptible of being proved true or false. [3] The court found that Rooney's presentation as a whole was characterized by hyperbole to some extent, but his statement was not couched in loose, figurative, or hyperbolic language and gave the impression that Rooney was maintaining that Rain-X failed to perform as guaranteed. This did not weigh in favor of protecting Rooney from liability for defamation. [4] The court also found that the humorous and satirical nature of Rooney's segment of "60 Minutes" did not negate the impression that Rooney was making a factual assertion about Rain-X's performance when applied to his vehicle. Although part of a humorous report, Rooney's statement was presented as fact and understood as such by viewers who wrote to CBS. [5] The court found further that the statement "it didn't work" was an articulation of an objectively verifiable event. [6] This statement was essentially factual. Although Rooney's segment of "60 Minutes" contained some hyperbole and had a humorous tenor, his evaluation of Rain-X was capable of being understood as an assertion that the product failed to meet certain objective indicia of effectiveness. Therefore, the statement "it didn't work" is not shielded from liability under the standard established in *Milkovich*. The propriety of the district court's grant of summary judgment thus depended on whether Unelko created a triable issue of fact as to the falseness of Rooney's statements.

[7] The only evidence Unelko offered to defeat Rooney's summary judgment motion consisted of a comparison of a test performed on Rooney's automobile on June 9, 1988 that

revealed no traces of Rain-X and a test performed on a control vehicle that exhibited traces of Rain-X after six months of use and exposure; the deposition of Rooney's wife Marguerite which stated that the windshield Rooney had purportedly just treated with Rain-X corresponded in appearance to a picture of a windshield without Rain-X on the Rain-X box; and Rooney's deposition testimony in which he was unable to identify with precision the amount of time he spent applying Rain-X to his automobiles or the exact date on which he used the product. [8] The district court's finding that, in spite of this evidence, no reasonable jury could conclude that Rooney did not use Rain-X on two of his vehicles during the winter of 1988-89 was persuasive. Unelko's evidence was inferential and ambiguous. [9] Unelko's evidence did not demonstrate that any of Rooney's statements were false in substance and thus was not sufficient to avoid summary judgment.

COUNSEL

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Douglas P. Jacobs, New York, New York, for the defendants-appellees.

OPINION

ALARCON, *Circuit Judge:*

Plaintiffs Unelko Corporation and Howard G. Ohlhausen (Unelko) appeal from an order dismissing their defamation claim against Andy Rooney and CBS, Inc. (Rooney) on summary judgment. The suit arises from statements made

by Rooney during the April 17 and May 8, 1988 broadcasts of "60 Minutes," among which was the assertion that Unelko's product "Rain-X" "didn't work." The district court granted summary judgment for Rooney, finding that Rooney's statement that Rain-X "didn't work" was protected as opinion and that Unelko had failed to raise a triable issue of fact as to whether any of Rooney's statements were false and defamatory. We affirm because we agree that Unelko failed to create a triable issue of fact as to falsity.

STATEMENT OF THE CASE

On October 1, 1987, *The Arizona Republic* published a column by Andy Rooney, entitled "RAIN," which reflected on the writer's associations with rainy days. In response to Rooney's comment that cars should have "truck-sized windshield wipers" that would clean the entire windshield, Unelko's national sales manager sent Rooney a letter accompanied by a small supply of Unelko's product "Rain-X." The letter stated in part:

> Andy, you don't need those truck-size windshield wipers—all you need is RAIN-X—"The Invisible Windshield Wiper". The one-step, wipe-on automotive glass coating that repels rain, sleet and snow on contact and takes up where windshield wipers leave off!
>
> Our President, Howard Ohlhausen, inventor of RAIN-X (among other chemical products) first realized the same drawbacks that you referred to in your article as a navigator in the United States Air Force. With these windshield wiper inadequacies in mind, Mr. Ohlhausen invented RAIN-X and received a chemical patent in 1972.

> Enclosed please find literature outlining the many benefits, applications and properties of this unique material.
>
> *In order that you may personally test and evaluate RAIN-X performance,* we have forwarded a small supply to you today via U.P.S.
>
> We trust that RAIN-X will increase your affection for rainy days, while increasing your driving safety, comfort and visibility.

(Emphasis added).

During the April 17, 1988 broadcast of "60 Minutes," Rooney commented on "junk" he had received in the mail. Rooney's entire segment consisted of the following:

> MIKE WALLACE: You think you get junk mail? How would you like to be Andy Rooney? Or, even worse, how would you like to be Andy Rooney's mailman?
>
> ANDY ROONEY: People send me things. I get an awful lot of junk that I don't want that just seems too interesting to throw away. Some people send me stuff because they're friendly. Others, of course, send it because they're looking for a plug on the air.
>
> I get a lot of caps, and a lot of cups. This is a cup from the ship *Guam* that I spent some time on off Beirut. Captain Quarterman sent me this; I like it. This is a musical cup. I don't like that much.
>
> I get a lot of music sent me. People send me songs they've written on tape, which I don't listen to. This is a piece of sheet music. It's from a prisoner in Florida, and the song is called "Lady Liberty, Oh How I Love

Thee." He's in prison for murder, so he's going to be there a long time without liberty.

Hamilton Watch sent me this expensive watch. It's not really proper for me to keep something like this, and I should send it back.

I get pictures of myself. Here's a picture of me at a party with John Chancellor. You probably didn't know I traveled in those circles.

Here's the sort of thing I get a lot of. I don't know why they sent me this. It's a piece of a door. I guess they were pushing some new kind of material.

Here's something for the windshield of your car called Rain-X. The fellow who makes this sent me a whole case of it. He's very proud of it. I actually spent an hour one Saturday putting it on the windshield of my car. I suppose he'd like a commercial or a testimonial. You know how they hold the product up like this? It didn't work.

And then I get books. Holy mackerel, do I get books. Mostly from publishers, but I get a lot from authors, too. They send me their manuscripts. They want me to read them.

Look at this. Several people have sent me this over the years. The illustrator ripped off a picture of me. I suppose I could have sued him, but I was busy that day.

This is the most repulsive thing anyone sent me. It's from some anti-cigarette group. It's an ashtray in the shape of a human lung.

Someone suggested I could neaten up my office with these giant paper clips. Sort of a good idea.

> This is one of the best things I ever got. It's a orange peeler. It's changed my life. Simple enough, made by some company in Tulon, Illinois. I have an orange almost every morning of my life, and I love peeling it this way. It really is magic. You can amaze your friends with this. Look at that. There. Presto!
>
> People are very nice. But would you do me two little favors? One, don't send me anything more. And two, don't ask me to send any of this to you.

Several viewers wrote to Rooney after the broadcast, stating that Rain-X is a good product and that "it works." Although the mail Rooney received was unanimous in praising Rain-X, Unelko had previously received several letters complaining that "[Y]our product simply doesn't work"; "I found the product did not perform as advertised"; and "This product did not work for me."

On May 4, 1988, Unelko filed an action based on the April 17 "60 Minutes" broadcast for defamation, product disparagement, and tortious interference with business relationships. On May 8, 1988, Rooney made the following statements during his segment of "60 Minutes":

> BRADLEY: You want to talk money? Big money? Talk to Andy Rooney.
>
> ANDY ROONEY: Tonight I feel like a rich man. Along with CBS, I'm being sued for $16 million. I hope they take American Express. You may recall that three weeks ago I talked about things people have sent me. One of the items was this product, called Rain-X, made

by the Unelko Corporation of Scottsdale, Arizona. The tag on this three and a half ounce bottle says that it lists for $6.59, sells for $3.70.

"Dramatically improves wet weather visibility, even without wipers. Repels rain, sleet and snow. Makes frost, bugs, mud and grime easy to remove."

Well, I said I tried it and it didn't work for me. No matter what you say on 60 Minutes, you get a reaction. The clock was still ticking when I got a call from a fellow at a local boatyard in our town, saying he'd come right over and show me how to use Rain-X.

Then we got letters saying it was a good product. David Fryer of Silver Spring, Maryland, says "Granted, the product is not easy to apply correctly, but once it is applied, it performs absolutely everything its manufacturer claims for it." John Wadsworth of Greensburg, Pennsylvania, says it works "if you use just water and not window cleaner in your windshield sprayer." Robert DeLay of Ettawa, Tennessee, says, "If I were Rain-X, I'd sue you." June Willis of Houston says, "I think you owe the inventor, Howard Ohlhausen, an apology." Well, I'll tell you, June, he'd have a lot easier time getting an apology out of me than $16 million. Jim Mills, *Automotive News* western sales manager, says, "Your comments about Rain-X were very unfair."

Several letters said that Rain-X works best when you're going fast, and maybe that was my trouble. I called American Airlines trying to find out what they think of Rain-X, and I called several automobile manufacturers, to see what they say about it, but I didn't get

> any help here because they don't use it, and I haven't been able to find out what Rain-X is made of.
>
> So that's my problem tonight, friends. This fellow sent me this product to evaluate, and I did. Was I only expected to comment on it if I loved it? What if he'd sent me two tickets to a movie he'd made, and I didn't like the plot? He must know I don't do commercials. But, in spite of all that, to tell you the truth, I feel sort of bad about the whole thing. Please don't send money unless I ask for it.

Unelko subsequently requested and obtained leave to amend its complaint to assert additional claims for relief stemming from the May 8 broadcast.

Rooney moved for summary judgment on December 5, 1988. On April 25, 1989, the district court granted the motion. Unelko timely appeals.

DISCUSSION

I. Defamation Claim

Unelko claims that the district court's grant of summary judgment on its defamation claim was improper. We review a grant of summary judgment de novo. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir.), *cert. denied*, 110 S. Ct. 59 (1989). The district court granted summary judgment because it determined that none of Rooney's words were defamatory statements of fact. The court found that (1) Rooney's statement that Rain-X "didn't work" was protected opinion, and (2) Unelko failed to create a triable issue of fact as to the falsity of any of Rooney's statements that could be viewed as defamatory.

A. *The District Court's Ruling That "It Didn't Work" Was "Opinion"*

[1] Relying on a significant body of Ninth Circuit case law, the district court found that Rooney's statement that Rain-X "didn't work" was opinion and thus exempt from liability. *See, e.g., Ault v. Hustler Magazine*, 860 F.2d 877, 880 (9th Cir. 1988) ("[I]f a challenged statement is one of opinion rather than fact, then under the first amendment it cannot give rise to a defamation claim."), *cert. denied*, 109 S. Ct. 1532 (1989); *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) ("[A]n opinion is simply not actionable defamation.").[1] The cases on which the district court relied, however, have all been effectively overruled by the Supreme Court's recent opinion in *Milkovich v. Lorain Journal Co.*, No. 89-645, slip op. ____ (U.S. June 21, 1990). In *Milkovich*, the Court rejected the view that "an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Id.*, slip op. at ____. Thus, the threshold question in defamation suits is not whether a statement "might be labeled 'opinion,'" but rather whether a reasona-

[1] Because the Arizona Supreme Court has based its rule that opinion is not actionable on the Supreme Court's analysis of the first amendment, *see MacConnell v. Mitten*, 131 Ariz. 22, 638 P.2d 689, 692 (1981) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)), there is no evidence that Arizona courts would extend more protection to opinion than is required by the federal Constitution.

ble factfinder could conclude that the statement "impl[ies] an assertion of objective fact." *Id.*, slip op. at ____.[2]

Because the "opinion" test applied by the district court is now obsolete, the district court's conclusion that the statement "It didn't work" enjoys first amendment protection as opinion is unwarranted. Yet the record is sufficiently developed for us to analyze both whether "It didn't work" implies an assertion of fact, as required by *Milkovich*, and whether Unelko met its burden of making a showing of falsity. Much of the district court's analysis is relevant in determining whether "It didn't work" is a factual statement. The district court's order discusses Unelko's evidence of falsity at length. We may base our "ruling on any ground finding support in the record." *Jackson v. Southern Cal. Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989). For this reason and because the record is fully developed, we apply the analysis required by *Milkovich*.

B. *"It Didn't Work" as Assertion of Fact*

Rooney argues that his statement "It didn't work" did not imply an assertion of fact. He relies on *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), for the proposition that speech is protected when it "could not reasonably have been

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[2] It is worthy of note that the Supreme Court's test leaves protected the category of speech known as "pure opinion"—that is, statements that do not imply facts capable of being proved true or false. *Milkovich*, slip op. at ____ (Brennan, J. dissenting). Thus, there remains much truth in the old adage: "You should not say it is not good. You should say you do not like it, and then, you know, you're perfectly safe." Workman Quote-a-Day Calendar, at June 26, 1990 (quoting James MacNeil Whistler).

interpreted as stating actual facts about the [product] involved." *Id.* at 50.

[2] The Court in *Milkovich* determined that the statement before it—that a high-school wrestling coach lied at an athletic association hearing—implied an assertion of fact because the statement satisfied three conditions:

> This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.
>
> We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.

Id., slip op. at ____. In order to determine whether Rooney's statement that Rain-X "didn't work" could be viewed as implying an assertion of fact, we will analyze: (1) whether Rooney used figurative or hyperbolic language that would negate the impression that he was seriously maintaining that Rain-X did not perform effectively; (2) whether the general tenor of Rooney's segment of "60 Minutes" negated this impression; and (3) whether the assertion that a product works is susceptible of being proved true or false.

1. *Figurative or Hyperbolic Language*

As this circuit has long recognized, there are certain "circumstances in which an 'audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole . . . .'" *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (quoting *Gregory v. McDonnell*

Douglas Corp., 17 Cal. 3d 596, 131 Cal. Rptr. 641, 643, 552 P.2d 425, 428 (1976)). In determining whether Rooney's statement is actionable, we "examine the statement in its totality in the context in which it was uttered or published." *Id.*

[3] As the district court noted, Rooney's presentation, as a whole, was characterized by hyperbole to some extent: his analysis contained such statements as "I suppose I could have sued him, but I was busy that day," "This is the most repulsive thing anyone sent me," and "This is one of the best things I ever got." Given the flavor of Rooney's comments, an audience might anticipate rhetoric or hyperbole, rather than a factual assessment of Rain-X's capabilities. Nevertheless, Rooney's statement "It didn't work" is not couched in loose, figurative, or hyperbolic language. It produces the impression that Rooney is maintaining that Rain-X failed to perform as guaranteed, the context of his broadcast notwithstanding. For this reason, the first factor considered by the Supreme Court does not weigh in favor of protecting Rooney from liability for defamation.

2. *The Tenor of Rooney's Broadcast*

[4] To support its finding that Rooney's statement was protected opinion, the district court found that the tenor of Rooney's broadcast was humorous and satirical. The district court noted:

> [I]t can hardly be disputed that those who turn in to watch Andy Rooney on "60 Minutes" understand that his comments and statements are humorous, satirical, full of ridicule and often to be taken with a grain of salt. His audience realizes that what they get from Rooney is not a factual summation of the news but rather

> Rooney's opinions on a variety of subjects. Thus, they are less likely to take his comments seriously or as the absolute truth than they would statements from a newspaper or newsprogram whose purpose is to report factual news stories.

The tenor of Rooney's segment notwithstanding, the statement "It didn't work" could reasonably be viewed as implying an assertion of objective fact. The humorous and satirical nature of Rooney's segment of "60 Minutes" does not negate the impression that he was making a factual assertion about Rain-X's performance when applied to his vehicles. Although part of a humorous report, the statement "It didn't work" was presented as fact and understood as such by several viewers who wrote to CBS. The humor in Rooney's statement about Rain-X is derived not from hyperbole or exaggeration, but from the fact that his report of the product's effectiveness was the antithesis of what its inventor presumably desired. Rooney's negative evaluation of Rain-X's capabilities differs significantly from his personal assessment of the other items he received in the mail; thus, it receives no protection based on the overall tenor of his "60 Minutes" segment.

3. Whether "It Didn't Work" Is Sufficiently Factual to Be Susceptible of Being Proved True or False

In determining whether Rooney's words were opinion, the district court noted the vagaries of the statement "It didn't work" as applied to Rain-X:

> As an example, whether or not a lightbulb works is an objective determination. Either it gives off light or it doesn't. Its performance is constant. Consequently whether it works can be determined solely by one's own

> sensory perception; there is no room for differences of opinion. Other products are incapable of such objective determination. Whether they work depends upon one's subjective evaluation or opinion, which may be influenced by a multitude of differing factors, conditions, situations and perspectives. Rain-X is in the latter category as evidenced, in part, by the letters in the record from consumers expressing both pleasure and displeasure with the product. Consequently, whether Rain-X works is a subjective determination capable of producing divergent opinions among those who try it. When Rooney stated "it didn't work," he was simply expressing his opinion of the product.
>
> As a result, in this context no defamatory meaning can be attached to Rooney's statement.

Although the district court's analysis under the old "opinion" test may have been correct, whether the facts implied by Rooney's "opinion" are susceptible of being proved true or false is a different matter. Turning to a dictionary, one finds that "work," in the sense Rooney used it, means "to function or operate according to plan or design," *Webster's New International Dictionary* (3d ed. 1986), a standard capable of objective determination to some extent when applied to a product designed to improve visibility. *But cf. Lewis,* 710 F.2d at 554 ("[W]e think the term 'shady' is by definition 'cautiously phrased in terms of apparency.' According to Webster's New International Dictionary Unabridged (2d ed.), it means in this context 'equivocal as regards merit or morality; unreliable; disreputable.' ").

Contrary to the district court's analysis, the functions Rain-X purports to perform are not entirely dependent on

subjective evaluation. The Rain-X bottle Rooney used, and displayed to the camera, boasted that Rain-X:

> Dramatically improves wet weather visibility—extends & expands your field of vision—lets you see clearly with and without wipers!
>
> Covers windshields, side and rear windows, mirrors & lights with an invisible shield that disperses rain, sleet & snow on contact—shrugs off bugs, frost, salt, mud & grime, makes cleaning a snap. Whatever the weather, whatever you drive—use rain-x for increased all-around visibility, safety & driving comfort.

Although Rooney identified Rain-X only as "something for the windshield of your car", the extent to which Rain-X lived up to its bottle's claims would be what anyone familiar with the product would have believed Rooney intended his words to mean.

[5] Rooney's statement thus implied that his visibility was not improved, that Rain-X's shield was not invisible, that rain did not disperse on contact, that Rain-X did not repel bugs and other projectiles, that cleaning was not a snap, and that Rain-X did not increase Rooney's all-around visibility, safety, and driving comfort.[3] Although these are somewhat subjective determinations, they are based on factual observations to a sufficient extent to imply an assertion of fact. Whether Rain-X repels rain, facilitates window cleaning, and increases visibility are all capable of being proved true or false. Each determination rests on "a core of objective evidence." *Milkovich*, slip op. at __. Thus, the

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[3] Rooney noted at his deposition that Rain-X "tended to smear."

statement "It didn't work" is " 'an articulation of an objectively verifiable event.' " *Id.* (quoting *Scott v. News-Herald*, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707 (1986)).

[6] For these reasons, a factfinder could conclude that Rooney's statement that Rain-X "didn't work" implied an assertion of objective fact. Unlike the exaggerated and satirical account of "a drunken incestuous rendezvous [between plaintiff and] his mother in an outhouse" at issue in *Falwell*, 485 U.S. at 48, the statement "It didn't work" is essentially factual. Although Rooney's segment of "60 Minutes" contained some hyperbole and had a humorous tenor, his evaluation of Rain-X was capable of being understood as an assertion that the product failed to meet certain objective indicia of effectiveness. Although the district court may have been correct in characterizing Rooney's words as "opinion," the statement "It didn't work" is not shielded from liability under the standard established in *Milkovich*. Thus, the propriety of the district court's grant of summary judgment depends on whether Unelko created a triable issue of fact as to the falsity of Rooney's statements.

C. Unelko's Showing of Falsity

Even though Rooney's words are not protected as opinion, summary judgment was proper if Unelko made no showing that Rooney's statements were false or implied false assertions of fact. Unelko argues that summary judgment was improper because Rooney's statement that he had used Rain-X was false, and because the facts implied by the statement that Rain-X "didn't work" were also false and defamatory. For the purposes of analyzing Unelko's showing of falsity, we assume that Rooney's statement "It didn't work" implied the following factual assertions about Rain-X's performance, which Rooney made at his deposi-

tion—that it "hazed over when the windshield wiper went one way and tended to smear," that it caused his windshield to be "splotchy," and that the "windshield did not look like the picture on [the] box."

To avoid a grant of summary judgment, Unelko had to " 'set forth specific facts showing that there [was] a genuine issue for trial.' " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

As the Supreme Court has noted, in a private individual's defamation action involving statements of public concern, there is " 'a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.' " *Milkovich*, slip op. at ____ (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)). Thus, "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved." *Id.*, slip op. at ____.

" '[Whether] . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1986) (opinion of Powell, J.) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). Rooney's statement about Rain-X was of general interest and was made available to the general public. *Cf. id.* at 762 (concluding that a

credit report "concerns no public issue" because "[i]t was speech solely in the individual interest of the speaker and its specific business audience" and "was made available to only five subscribers"). Moreover, protection of statements about product effectiveness will "ensure that 'debate on public issues [will] be uninhibited, robust and wide-open.' " *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). We are persuaded that Rooney's statement addressed a matter of public concern. *Cf. Lechuga, Inc. v. Montgomery*, 12 Ariz. App. 32, 467 P.2d 256, 261 (1970) (Jacobson, J., concurring) ("It is in the public interest to discourage the marketing of defective products.").

Because Rooney's statements involved a matter of public concern, Unelko would bear the burden of proof at trial as to whether Rooney's statements were false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562, 567 (1986); *see also Phoenix Newspapers v. Church*, 103 Ariz. 582, 447 P.2d 840, 854-55 (1968) (en banc) (falsity must be established by a preponderance of the evidence), *cert. denied*, 394 U.S. 959 (1969). Our determination whether to affirm the grant of summary judgment thus hinges on whether Unelko provided the district court with a sufficient showing that any of Rooney's statements, including his implied factual assertions about Rain-X's performance, were untrue.

[7] The only evidence Unelko offered to defeat Rooney's summary judgment motion consisted of: (1) a comparison of a test performed on Rooney's automobile on June 9, 1988 that revealed no traces of Rain-X and a test performed on a "control vehicle" that exhibited traces of Rain-X after six months of use and exposure; (2) the deposition testimony of

Marguerite Rooney, Rooney's wife, which stated that the windshield Rooney had purportedly just treated with Rain-X corresponded in appearance to a picture of a windshield without Rain-X on the Rain-X box; and (3) Rooney's deposition testimony, in which he was unable to identify with precision the amount of time he spent applying Rain-X to his automobiles or the exact date on which he used the product. Unelko argues that this evidence constitutes a sufficient showing to raise a triable issue of fact as to whether Rooney used Rain-X at all, and thus as to the falsity of factual assertions stated or implied in Rooney's segment.

[8] The district court's finding that, in spite of this evidence, "no reasonable jury could conclude that Rooney did not use Rain-X on two of his vehicles sometime during the winter of 1987-88" is persuasive. As the district court noted, Unelko's evidence is inferential and ambiguous. Rooney's deposition testimony, although not precise, reveals familiarity with Rain-X's properties when applied. Marguerite Rooney's deposition testimony supports her husband's testimony that he used Rain-X; she testified that she first learned of Rooney's Rain-X use in late 1987, when her windshield appeared foggy and asked her husband what he had done to the car. Finally, given the absence of any evidence that Rooney's Connecticut-based vehicles and Unelko's Arizona-based "control vehicle" were maintained under the same conditions, the district court properly found that the test evidence did not satisfy Unelko's burden of making a showing of falsity. *Cf. Cowens v. Siemens-Elema* AB, 837 F.2d 817, 820 (8th Cir. 1988) ("It is settled law that evidence of experimental tests is inadmissible absent a foundational showing that the tests were conducted under

conditions similar to those surrounding the incident at issue.").

As the Supreme Court noted in *Anderson*, "[t]he question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not." 477 U.S. at 254 (emphasis in original). A reasonable jury could not find that Unelko met its burden of proving falsity by a preponderance of the evidence. Unelko provided no evidence that traces of Rain-X on Rooney's vehicles would survive a Connecticut winter[4]; moreover, " 'discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion.' " *Id.* at 256-57 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984)). Unelko has thus failed to produce any "affirmative evidence . . . to defeat a properly supported motion for summary judgment." *Id.* at 257. It has, at best, created ambiguity, and this fails to meet the constitutional standard. *See Hepps*, 475 U.S. at 776 ("[T]he burden of proof is the deciding factor . . . when the evidence is ambiguous . . . . [W]here the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.").

[9] A factual statement need only be substantially true in order to be protected from a suit for defamation. *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 636 P.2d 1257, 1261 (Ct. App. 1981). Unelko's evidence did not demonstrate that any of Rooney's statements were false in sub-

[4] Indeed, Unelko's promotional literature states that the length of time Rain-X remains on car windows is dependent upon such factors as environment, climate, and time of year.

stance and thus was not sufficient to avoid summary judgment. Because there was not sufficient evidence favoring Unelko for a jury to return a verdict against Rooney, the district court properly granted summary judgment on Unelko's defamation claim.

II. Unelko's Other Claims

Unelko also argues that its claims for product disparagement, or "trade libel," and for tortious interference with business relationships were improperly dismissed. These claims, however, are subject to the same first amendment requirements that govern actions for defamation. *See Gee v. Pima County*, 126 Ariz. 116, 612, P.2d 1079, 1079 (Ariz. App. 1980) (requiring "the intentional publication of an injurious falsehood" for trade libel); *Snow v. Western Sav. & Loan Ass'n*, 152 Ariz. 27, 35, 730 P.2d 204, 212 (1986) (en banc) ("To be 'improper' an interference [with business relationships] must be 'wrongful by some measure beyond the fact of the interference itself.' " (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 209, 582 P.2d 1365, 1371 (1978)). *See generally Falwell*, 485 U.S. at 57 (noting that when a claim for defamation fails because defendant's speech is constitutionally protected, a claim for intentional infliction of emotional distress "cannot, consistently with the First Amendment, form a basis for the award of damages"); *Fendler*, 636 P.2d at 1262-63 (defense of truth is equally applicable to other causes of action based upon the same libel claim). Because it properly found that no genuine issue of fact existed as to whether Rooney's words constituted defamatory statements of fact, the district court did not err in granting summary judgment on Unelko's other claims.

The district court's judgment is AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNELKO CORP.; etc.
Plaintiffs-Appellants,
v.
ANDY ROONEY, an individual;
CBS, INC.,
Defendants-Appellees.

No. 89-15751
CV-88-0705-PHX-RCB

APPEAL from the United States District Court for the District of ARIZONA (Phoenix)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of _____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
DEC 11 1990

by: _____
Deputy Clerk

Filed and entered AUGUST 24, 1990

FILED DEC 17 1990
United States District Court
for the District of Arizona

By: _____
Deputy Clerk

APPENDIX B

FILED APRIL 25, 1989

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

UNELKO CORP., et al.,

Plaintiffs,

vs

ANDY ROONEY, et al.,

Defendants.

No. CIV 88-705 RCB PHX

ORDER

The issue for purposes of this summary judgment motion is whether a well-known humorist and social commentator's pronouncement on national television that a product does not work subjects him and his network to liability to the product manufacturer for defamation, product disparagement and tortious interference with business relationships. After consideration of the pleadings, papers and exhibits in both written and video form, hearing of oral argument and review of the applicable case law, this Court finds that the comments made by defendant Andy Rooney are not defamatory as a matter of law and thereby grants defendants' motion for summary judgment.

This lawsuit arises out of the April 17, 1988 broadcast by defendant CBS Inc. ("CBS") of "60 Minutes," the popular weekly television news magazine show. During the broadcast, Andy Rooney did a feature on the variety of things people sent him. Among other items, Rooney discussed Rain-X, a product which is applied to automobile windshields and is designed to improve visibility in inclement weather by repelling rain, snow and sleet. Rain-X is manufactured by plaintiff Unelko Corporation ("Unelko") of Scottsdale, Arizona. Plaintiff Howard Ohlhausen is the

President of Unelko and the inventor of Rain-X. Rooney's specific comments concerning Rain-X were as follows:

> Here's something for the windshield of your car called Rain-X. The fellow who makes this sent me a whole case of it. He's very proud of it. I actually spent an hour one Saturday putting it on the windshield of my car. I suppose he'd like a commercial or a testimonial. You know how they hold the product up like this? It didn't work.

Plaintiffs filed this lawsuit on May 4, 1988 claiming that Rooney's comments concerning Rain-X were false and defamatory. In their complaint, plaintiffs alleged causes of action for product disparagement, defamation of Unelko and Ohlhausen and tortious interference with business relationships.

On the May 8, 1988 broadcast of "60 Minutes" Rooney did a follow-up piece on Rain-X and the initiation of this lawsuit. Plaintiffs claimed that remarks made by Rooney during this broadcast were also defamatory and were intentionally crafted to hold plaintiffs up to further ridicule. Plaintiffs subsequently filed a motion to amend their complaint. By order of this Court dated November 15, 1988, plaintiffs were allowed to amend their complaint to include these additional statements.[1]

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[1] The remarks made by Rooney in the May 8 broadcast are set forth in their entirety.

> Tonight I feel like a rich man. Along with CBS, I'm being sued for $16 million. I hope they take American Express. You may recall that three weeks ago I talked about things people have sent me. One of the items was this product, called Rain-X, made by the Unelko Corporation of Scottsdale, Arizona. The tag on this three and a half ounce bottle says that it lists for $6.59, sells for $3.70.

"Dramatically improves wet weather visibility, even without wipers. Repels rain, sleet and snow. Makes frost, bugs, mud and grime easy to remove."

Well I said I tried it and it didn't work for me. No matter what you say on 60 Minutes, you get a reaction. The clock was still ticking when I got a call from a fellow at a local boatyard in our town, saying he'd come right over and show me how to use Rain-X.

Then we got letters saying it was a good product. David Fryer of Silver Spring, Maryland says "Granted, the product is not easy to apply correctly, but once it is applied, it performs absolutely everything its manufacturer claims for it." John Wadsworth of Greensburg, Pennsylvania, says it works "if you use just water and not window cleaner in your windshield sprayer." Robert DeLay of Ettawa, Tennessee, says "If I were Rain-X I'd sue you." June Willis of Houston says, "I think you owe the inventor, Howard Ohlhausen, an apology." Well, I tell you, June, he'd have a lot easier time getting an apology out of me than $16 million. Jim Mills, Automotive News western sales manager, says, "Your comments about Rain-X were very unfair."

Several letters said that Rain-X works best when you're going fast, and maybe that was my trouble. I called American Airlines trying to find out what they think of Rain-X, and I called several automobile manufacturers to see what they say about it, but I didn't get any help there because they don't use it, and I haven't been able to find out what Rain-X is made of.

So that's my problem tonight, friends. This fellow sent me his product to evaluate, and I did. Was I only expected to comment on it if I loved it? What if he'd sent me two tickets to a movie he's made, and I didn't like the plot? He must know I don't do commercials. But, in spite of all that, to tell you the truth, I feel sort of bad about the whole thing. Please don't send money unless I ask for it.

Defendants now bring this motion for summary judgment pursuant to Fed. R. Civ. P. 56 on the basis that Rooney's statements are not defamatory under Federal and State Constitutional law in that they constitute opinion and/or are substantially true. Plaintiffs oppose defendants motion for summary judgment by arguing that Rooney's comments contain actionable statements of fact and that an issue remains as to whether Rooney indeed ever tried Rain-X or else misused the product.

SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the record establishes that there exists "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment should issue, the facts and inferences from these facts are viewed in the light most favorable to the non-moving party and the burden is placed on the moving party to establish both that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356-1357, 89 L.Ed.2d 538 (1986). The moving party may discharge this burden by showing there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The party opposing a motion for summary judgment cannot rest upon his mere allegation or denials of his pleadings, but must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2515, 91 L.Ed.2d 202 (1986).

Under recently enunciated standards set forth by the United States Supreme Court, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no genuine issue of material fact. *Anderson, supra*, 106 S. Ct. at 2514. A material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*, 106 S. Ct. at 2510.

At the summary judgment stage, the trial judge's function is to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, the judge may grant summary judgment. *Id.*, 106 S. Ct. at 2511.

USE OF RAIN-X

As a sort of preliminary bout to the main event, the main event involving First Amendment rights under the United States and Arizona Constitutions, plaintiffs argue that before the constitutional issues can even be addressed, there exists an issue of fact precluding summary judgment as to whether Rooney actually used Rain-X as he represented and/or whether he used it properly. Plaintiffs contend that implicit in Rooney's declaration that Rain-X did not work is the express representation that Rooney actually used the product and properly applied it to his automobiles. Plaintiffs claim that if the expressed or assumed facts underlying a statement, even a statement of opinion, are false, a defen-

dant cannot escape liability for defamation or disparagement.[2]

In opposing defendants' summary judgment motion, plaintiffs submit evidence which they claim indicates that Rooney never applied Rain-X to his automobiles as he represented during his broadcast. This evidence consists largely of a comparison of the results of a test conducted by plaintiffs of Rooney's automobiles on June 9, 1988 and a test of a control vehicle treated with Rain-X approximately six months earlier. The purpose of the test was to determine the presence or absence of Rain-X on each vehicle. According to the affidavit of Howard Ohlhausen, the test revealed no evidence of Rain-X on any of Rooney's automobiles while Unelko's control vehicle still exhibited the presence of Rain-X after more than six months of use and exposure. Plaintiffs claim that the results of this test indicate that Rooney's vehicles were either never treated with Rain-X or, at the very least, had not been treated properly according to Unelko's explicit instructions.

Plaintiffs also set forth the deposition testimony of Rooney's wife, Marguerite Rooney, to the effect that when she observed rain on the automobile windshield that had purportedly just been treated with Rain-X by her husband, she observed an effect corresponding to a photograph on the Rain-X box that portrays a windshield without Rain-X. From this, plaintiffs conclude that Mrs. Rooney's testimony

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[2] The Restatement (Second) of Torts §§ 565 and 566 provide that a defamatory communication may consist of a statement of fact or a statement in the form of an opinion but that the latter is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. *Restatement (Second) of Torts* §§ 565, 655 (1977).

regarding her observation of the vehicle's windows confirms the absence of Rain-X from the windshield of the car.

Finally, plaintiffs claim that the fact that Rooney admitted in his deposition that he did not spend an hour applying Rain-X to the windshield of his car nor could he testify with any degree of accuracy as to the date he used Rain-X indicate that Rooney did not use Rain-X as he represented during his broadcast.

Plaintiffs bear the burden of proof on the issue of the falsity of Rooney's statements. *See Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558 (1986).[3] Under Fed. R. Civ. P. 56(e), the party opposing a motion for summary judgment cannot rest upon his mere allegation or denials of his pleading, but must set forth specific facts showing that there exist genuine issues of material fact to be resolved. *Anderson v. Liberty Lobby, supra*, 106 S. Ct. at 2514. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita, supra*, 106 S. Ct. at 1356.

In this instance, the evidence set forth by plaintiffs fails to convince this Court that a genuine issue of fact exists as to whether or not Rooney used plaintiffs' product Rain-X on his automobile as represented during his broadcast. The Court finds that no reasonable jury could conclude that Rooney did not use Rain-X on two of his vehicles sometime

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[3] In *Philadelphia Newspapers*, the Supreme Court held, at least in context of a media defendant, "that the common law's rule on falsity-that the defendant must bear the burden of proving truth-must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.*, 106 S. Ct. at 1563.

during the Winter of 1987-88. The evidence offered by plaintiffs to the contrary is inferential and ambiguous at best.

The deposition testimony of both Andy and Marguerite Rooney indicate that Rooney applied Rain-X to the windshield of both his and his wife's car one Saturday while washing the cars. Rooney testified that before he began washing the cars, he noticed a couple bottles of Rain-X in his garage and decided to try it. He claims he read the directions, carefully washed and dried the windows of the car and then applied Rain-X first to his car and then to his wife's car. Particularly probative is Rooney's testimony that after applying Rain-X to the windshield of his car, a haze or film developed on the window which he then wiped clean. This Court's review of the video tape provided by plaintiffs which demonstrates how to use Rain-X also reveals that a slight haze or film develops on the windshield after it is applied. This process would likely not be one that a person who had not used Rain-X would be cognizant or aware of. That Andy Rooney testified to this hazing or filming effect during his deposition is indicative of and consistent with the fact that Rooney did use plaintiffs product on his automobiles.

The truth or veracity of Rooney's testimony is further supported by the fact that although plaintiffs contend there is an issue of fact as to whether Rooney used Rain-X, plaintiffs also concede that Rooney could have used Rain-X in an improper manner. Plaintiffs never directly contend that Rooney is lying or attempting to fabricate a cover story when Rooney states he applied Rain-X to the windshield of his car. Rooney's testimony that he used Rain-X is highly plausible. Alternately, plaintiffs' evidence to the contrary is insufficient under the trilogy of recent United States Supreme Court cases to satisfy their burden on summary

judgment of proving that a genuine issue of material fact remains as to the truthfulness of Rooney's statement that he used Rain-X.

Marguerite Rooney's deposition testimony, contrary to plaintiffs assertions, supports her husband's testimony that he used Rain-X. Mrs. Rooney testified that she learned of Rain-X for the first time in late 1987 when, after she complained about a deterioration in their windshield visibility, her husband told her that he had put Rain-X on the windshield of the automobile. It was her testimony that the windshield appeared foggy and she asked her husband what he had done to the car. In response, Rooney acknowledged putting Rain-X on the windshield. This exchange occurred months before the commencement of this lawsuit and seemingly long before Rooney would have any possible motive to be untruthful about whether he had actually used Rain-X. The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). *Matsushita*, *supra*, 106 S. Ct. at 1361 ("Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence").

To contradict Rooney's statement and testimony that he used Rain-X, plaintiffs cite the fact that Rooney cannot remember the exact date of this usage. Although Rooney cannot pinpoint the exact date of when this occurred, the Court does not view this as especially probative or dispositive on the issue of whether Rooney actually used Rain-X. The Court recognizes that washing one's car is usually not a significant enough event in one's life to commit to memory the exact date upon which it occurred.

Plaintiffs also appear to place much emphasis on the fact that Rooney admits in deposition testimony that he probably did not spend an hour putting Rain-X on the windshield of

his car as he represented in his broadcast. The implication or conclusion plaintiffs apparently draw from this is that Rooney did not actually use Rain-X but instead invented "facts and then broadcast[ed] opinions allegedly based upon those fabrications."

The Court fails to see any relevance or connection between the fact that Rooney stated in his deposition that it did not take an hour to apply Rain-X and the issue of whether he used Rain-X at all.

First, Rooney states in his deposition that it took about an hour to wash two cars, dry the windshields, apply Rain-X to both vehicles, wipe off the haze or film which had developed and then put on a second coat of Rain-X pursuant to the product's instructions. Rooney admits that when he claimed on the broadcast that it took an hour to apply Rain-X to the windshield of his car, he did not separate or differentiate between the functions of washing his cars and applying Rain-X. Whether this tends to raise a genuine issue of material fact sufficient to lead a reasonable jury to find that Rooney did not use Rain-X as asserted is a tenuous proposition at best.

Second, the time it took for Rooney to apply Rain-X is not a material statement nor a crucial element in determining the truth of Rooney's representation that he used Rain-X. It is well established that literal truth of a publication need not be established, only that the statement be substantially true in order for it to provide an absolute defense to an action for defamation. *Fendler v. Phoenix Newspapers Inc.*, 130 Ariz. 475, 636 P.2d 1257, 1261 (Ariz. App. 1981). *See also Alioto v. Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980). Thus, the fact that it might not have taken Rooney an hour to apply Rain-X is not especially relevant to nor indicative of the falsity of the rest

of Rooney's statements for purposes of holding defendants liable for defamation.

Finally, the Court is persuaded that the result of tests plaintiffs performed on both Rooney's automobile and a control vehicle would not "lead a rational trier of fact" to find for plaintiffs on this particular issue. Plaintiffs claim their tests failed to detect the presence of Rain-X on Rooney's car thus raising an issue of fact as to whether Rooney ever used Rain-X in the first place.[4] The Court

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[4] The method of testing and the results of the test are set forth in the affidavit of Howard Ohlhausen. According to his affidavit, on June 9, 1988, Ohlhausen personally tested the windshield and side window of Rooney's BMW sedan and Ford station wagon for the presence of Rain-X. This was done by applying Rain-X to half the windshield and side window of Rooney's vehicles and comparing it to the half not so treated. The half treated by Rain-X on June 9 was visibly repellent to water compared to the half that was not treated. Based on this test, Ohlhausen concludes that there was no evidence of any Rain-X coating on Rooney's vehicles and that either Rooney did not apply Rain-X or if it had been applied, was done so incorrectly and insufficiently as to preclude product adhesion and performance.

To verify the durability of Rain-X and the validity and reliability of the test procedures employed on the Rooney cars, Ohlhausen instructed Unelko employees not to re-treat a previously treated Unelko vehicle for a period of approximately six months. The vehicle was driven in a normal manner and periodically washed but was not garaged in order to permit maximum exposure to the elements. On January 5, 1989, the Unelko vehicle was tested for the presence of Rain-X, using the identical procedures and sequence employed during the testing of the Rooney vehicles on June 9, 1988. Plaintiffs claim that the results of the test revealed that the Unelko vehicle, six months after last being treated with Rain-X, still demonstrated significant water beading, indicating the presence of Rain-X.

agrees with defendants' contention that no reasonable parallel can be drawn by comparison of the Unelko "control" vehicle to the Rooney vehicles in the absence of any evidence that the Unelko vehicle was maintained under the same conditions as the Rooney cars. "It is settled law that evidence of experimental tests is inadmissible absent a foundational showing that the tests were conducted under conditions substantially similar to those surrounding the incident at issue." *Cowens v. Siemens-Elema AB*, 837 F.2d 817, 820 (8th Cir. 1988). It does not take the testimony of Willard Scott for this Court to take judicial notice of the fact that the climatic conditions in Connecticut where Rooney resides are vastly different from those in the Phoenix area where the Unelko control vehicle was tested. Greater snow and rain precipitation in Connecticut creates lengthier periods of windshield wiper use and scraping. According to the Ohlhausen affidavit, "Rain-X dissipates as a result of the extended abrasive action of mechanical windshield wipers. . . ."[5] In addition, defendants attach as Exhibit A to their Reply brief, a copy of a page of Rain-X literature which states that: "Depending upon the environment, climate, time of year, amount of driving and frequency of mechanical wiper use; a typical application of Rain-X on the windshield will last anywhere from one week to several months." As a result, plaintiffs' own literature concedes that even if Rooney had used Rain-X shortly before his April 17 broadcast, it could have worn off long before the June 9th test date. Although unsure as to the exact date, Rooney is certain that he applied Rain-X to his vehicles sometime during the winter months either in late 1987 or early 1988. The fact that Rain-X could not be detected on Rooney's vehicles approximately 5 to 6 months after application is neither indicative nor dispositive of

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[5] Affidavit of Howard G. Ohlhausen, ¶2.

whether Rooney actually used Rain-X and thus fails to create a genuine issue of material fact.

Plaintiffs have failed to carry their burden of raising a genuine issue of fact concerning whether or not Rooney actually used Rain-X as he represented in his broadcast. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, the judge may grant summary judgment. *Anderson v. Liberty Lobby, supra*, 106 S.Ct. at 2511. As a result, defendants' summary judgment motion will not be denied on the basis of plaintiffs' contention that Rooney's broadcast contained false statements or false implications of fact.

STATEMENT OF FACT OR STATEMENT OF OPINION

The Court now turns its attention to the more important issue raised by this case. This case involves the inherent tension and conflict between the First Amendment and its guarantees of freedom of speech versus speech which is defamatory in nature and not subject to constitutional protection. In this instance, the fundamental issue is whether Rooney's statements regarding Rain-X were false statements of opinion subject to protection under the First Amendment.

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement (Second) of Torts § 559 (1977). Recovery for defamation may be had only for false statements of facts. Restatement (Second) of Torts § 581A. Statements of opinion are not actionable under the First

Amendment of the United States Constitution and Article 2, Section 6 of the Arizona Constitution. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *MacConnell v. Mitten*, 131 Ariz. 22, 25, 638 P.2d 689, 692 (1981).

Constitutional protection for the expression of opinion is based on the Supreme Court's pronouncement in *Gertz* that there is no such thing as a false idea.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Id. at 339-40, 94 S.Ct. at 3007. The determination of whether an allegedly defamatory statement is a statement of fact or statement of opinion is a question of law for the court. *See, e.g., Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 13-15, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *Lewis v. Time Inc.*, 710 F.2d 549, 553 (9th Cir. 1983).

It is well settled in this Circuit that the fact or opinion distinction in diversity cases is to be decided as a question of federal law. *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 880 (9th Cir. 1988). The three-prong test of whether the substance of a statement or publication is fact or opinion is: (1) whether the words can be understood in a defamatory sense in light of the facts surrounding the publication, including the medium by which and the audience to which the statement is disseminated; (2) whether the context in which the statements were made would lead the audience to anticipate persuasive speech; and (3) whether the language used is the kind generated in a "spirited legal dispute." *Id.* at 881; *Lewis, supra*, 710 F.2d at 533; *Information Control*

Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783-84 (9th Cir. 1980).

Discussing the three factors in turn, this Court concludes that the facts surrounding Rooney's statements weigh in favor of opinion, rather than fact.

Turning to the first factor, Rooney's allegedly defamatory statements were made during the course of his weekly commentary on "60 Minutes". "60 Minutes" is a newsmagazine show which broadcasts features or segments involving investigative reports and interviews with well-known newsmakers and personalities. "60 Minutes's" regular features are presented by correspondents, i.e., television reporters who conduct research and investigations into the subject matter of their report. These reports or features involve, among other things, the presentation of factual information. However, Andy Rooney does not appear on any of "60 Minutes" regular news reports or features. Instead, Rooney appears each week near the end of the show in his own segment entitled "A Few Minutes With Andy Rooney." Despite being characterized by plaintiffs as a correspondent, it is obvious that Rooney acts more in the role of a commentator during his weekly segment.[6] Unlike the other

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[6] Webster's Dictionary defines correspondent as "one employed by a newspaper or broadcasting company to contribute regular news reports or interpretations." Commentator is defined as "one who reports and discusses current events or daily news with interpretation and analysis." *Webster's Third New International Dictionary* (1981). The inclusion of the words "discusses" and "analysis" in the definition of commentator implies the setting forth of one's own observations, thoughts and opinions. This is an appropriate description of what Andy Rooney does during his segment on "60 Minutes". *See* Miller, *Sixty Minutes with Andy Rooney*, Saturday Evening Post, p. 64 (March 1984) ("A Few

regulars on the program, he does not report or interpret current events or hard news items but rather shares insights, observations, experiences and opinions on a host of topics ranging from life in general to everyday common occurrences and events.[7] Consequently, it can hardly be disputed that those who turn in to watch Andy Rooney on "60 Minutes" understand that his comments and statements are humorous, satirical, full of ridicule and often to be taken with a grain of salt. His audience realizes that what they get from Rooney is not a factual summation of the news but rather Rooney's opinions on a variety of subjects. Thus, they are less likely to take his comments seriously or as the absolute truth than they would statements from a newspaper or newsprogram whose purpose is to report factual news stories. As a result, the facts surrounding the publication of Rooney's statements support a finding that, rather than constituting statements of fact in the defamatory sense, Rooney's comments evolved from his own opinion of the product and were understood by the audience as such.

Turning to the second prong of the test, the context in which the allegedly defamatory statements were made would lead the average listener to anticipate persuasive speech. The context of Rooney's statements clearly indicate or signal to the listener the presence of rhetoric, ridicule, satire, sarcasm and humor. The Court's focus under this prong is not just on Rooney's statements concerning Rain-X

Minutes With Andy Rooney" is known for its "humorous commentary.").

[7] The Saturday Evening Post has described Rooney as "the folksy philosopher who understands little things . . . Often sage, sometimes silly, always succinct, his messages zing in on truths common to everyone. He can evoke chuckles when he sounds off on designer jeans and tears when he comments on the pain of growing old." *Id.* at 64-65.

but rather upon his entire broadcast. The test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality in the context in which it is uttered or published. *Information Control, supra,* 611 F.2d at 783. The Court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement.

A further consideration involves the visual aspect of Rooney's statements. In studying a television program for possible defamatory meanings, the court must not confine its analysis to the words alone. The court must also consider the impact of the video portion of the program since the television medium offers the publisher the opportunity, through visual presentation, to emphasize certain segments in ways that cannot be ascertained from a mere reading of the transcript. It is the entirety of the program, both audio and video, that must be considered susceptible of a defamatory meaning. *See Lasky v. American Broadcasting Companies, Inc.*, 631 F.Supp. 962, 970 (S.D.N.Y. 1986).

Review of both the transcript and video portion of Rooney's April 17 broadcast underscores the humorous and satirical nature of the feature.[8] It concerns things, i.e.,

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[8] The April 17 broadcast of "A Few Minutes With Andy Rooney" begins with a lead-in by Mike Wallace.

> *Mike Wallace*: You think you get junk mail? How would you like to be Andy Rooney? Or, even worse, how would you like to be Andy Rooney's mailman.
>
> *Andy Rooney*: People send me things. I get an awful lot of junk that I don't want that just seems too interesting to throw away. Some people send me stuff because they're friendly.

"junk" people send him. He talks about thirteen items of unsolicited "stuff," "junk," or "things" he received and

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Others, of course, send it because they're looking for a plug on the air.

I get a lot of caps, and a lot of cups. This is a cup from the ship *Guam* that I spent some time on off Beirut. Captain Quarterman sent me this; I like it. This is a musical cup, I don't like that much.

I get a lot of music sent me. People send me songs they've written on tape, which I don't listen to. This is a piece of sheet music. It's from a prisoner in Florida, and the song is called "Lady Liberty, Oh How I Love Thee." He's in prison for murder, so he's going to be there a long time without liberty.

Hamilton Watch sent me this expensive watch. It's not really proper for me to keep something like this, and I should send it back.

I get pictures of myself. Here's a picture of me at a party with John Chancellor. You probably didn't know I traveled in those circles.

Here's the sort of thing I get a lot of. I don't know why they sent me this. It's a piece of a door. I guess they were pushing some new kind of material.

Here's something for the windshield of your car called Rain-X. The fellow who makes this sent me a whole case of it. He's very proud of it. I actually spent an hour one Saturday putting it on the windshield of my car. I suppose he'd like a commercial or a testimonial. You know how they hold the product up like this? It didn't work.

And then I get books. Holy mackerel, do I get books. Mostly from publishers, but I get a lot from authors too. They send me their manuscripts. They want me to read them.

expresses a comment or opinion on each one. For instance, Rooney describes a song he received from a prisoner in Florida entitled "Lady Liberty, Oh How I Love Thee." Rooney then opines that since the prisoner is in prison for murder, he will be there a long time without liberty—certainly a humorous play on words and a signal to the viewer that this is a satirical piece. Rooney talks about an illustrated picture of himself that someone sent him. Rooney says that the illustrator "ripped off a picture of me" and "I suppose I could have sued him, but I was busy that day." It is obvious, however, that Rooney is not very serious about suing and the audience recognizes that through Rooney's comment that he was busy that day.

Equally relevant are Rooney's statements containing his personal views of some of the items he receives (e.g., "I like it"; "I don't like that much"; "one of the best things I ever

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Look at this. Several people have sent me this over the years. The illustrator ripped off a picture of me. I suppose I could have sued him, but I was busy that day.

This is the most repulsive thing anyone sent me. It's from some anti-cigarette group. It's an ashtray in the shape of a human lung.

Someone suggested I could neaten up my office with these giant paper clips. Sort of a good idea.

This is one of the best things I ever got. It's an orange peeler. It's changed by life. Simple enough, made by some company in Tulon, Illinois. I have an orange almost every morning of my life and I love peeling it this way. It really is magic. You can amaze your friends with this. Look at that. There. Presto!

People are very nice. But would you do me two favors? One, don't send me anything more. And two, don't ask me to send any of this to you.

got"; "the most repulsive thing anyone sent me"). These are clearly comments regarding Rooney's personal views and opinions on some of the items he receives. In this context, Rooney's comment concerning Rain-X, i.e., "It didn't work," is an expression of his personal opinion of the product.

Thus, within the context of the April 17 broadcast, the Court concludes that Rooney's comments concerning Rain-X could only be viewed by the audience as the manifestation of Rooney's personal opinion on and experience with Rain-X rather then a blanket statement of fact concerning the product's capabilities.

The third prong of the fact/opinion test involves consideration of the specific language of the allegedly defamatory statement. Under this prong, the Court focuses on Rooney's statement "It didn't work" since that is the only statement which arguably could be construed as defamatory. Whether those three words signify a statement of fact or statement of opinion is central to the claim of defamation. Much depends upon whether Rain-X is capable of or susceptible to an objective characterization of its performance.

As an example, whether or not a lightbulb works is an objective determination. Either it gives off light or it doesn't. Its performance is constant. Consequently, whether its works can be determined solely by one's own sensory perception; there is no room for differences of opinion. Other products are incapable of such objective determination. Whether they work depends upon one's subjective evaluation or opinion which may be influenced by a multitude of differing factors, conditions, situations and perspectives. Rain-X is in the latter category as evidenced, in part, by the letters in the record from consumers expressing both pleasure and displeasure with the product. Consequently, whether Rain-X works is a subjective determination capable

of producing divergent opinions among those who try it. When Rooney stated "it didn't work," he was simply expressing his opinion of the product. As a result, in this context no defamatory meaning can be attached to Rooney's statement.

The Court's ruling that Rooney's statements are statements of opinion rather than statements of fact and thus not defamatory is supported by cases with similarly analogous facts. Both parties attempt to bolster their respective positions by reference to a line of cases which they claim control this particular factual situation. Defendants cite the example of libel cases involving restaurant and movie reviews where the courts held in favor of the defendants. *See e.g., Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985). Defendants argue that Rooney's specific comments about Rain-X were in the nature of a review of the product and that such reviews clearly involve the expression of opinion. Plaintiffs claim that the nature of this incident is not analogous to a movie or restaurant review and the Court agrees. Those types of reviews are premised upon the idea that the opinions expressed by the reviewer are exactly that, his or her opinion. That is a premise already well established and recognized by the audience.

Neither does the Court quite agree with plaintiffs' contention that this case is similar to several cases involving consumer groups and experts where the courts recognized that defamatory statements concerning products and product manufacturers may be actionable. *See e.g., Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 1041 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Cranberg v. Consumers Union of U.S. Inc.*, 756 F.2d 382 (5th Cir. 1985); *Simmons Ford, Inc. v. Consumers Union of U.S. Inc.*, 516 F.Supp. 742 (S.D.N.Y. 1981). When consumer groups voice their opinions concerning a product, they are understood to have expertise in the area of consumer products and are expected

to have extensively tested the product. Whatever else Andy Rooney is, he is not an expert on consumer products and does not hold himself out as one. Neither does his audience understand him to be nor expect him to be an expert on consumer products.

This Court views this case as similar in nature to *Polygram Records v. Superior Court*, 170 Cal. App. 3d 549, 216 Cal. Rptr. 252 (1985), in which a California court ruled that a joke by comedian Robin Williams concerning a black wine named "Rege" was not defamatory to defendant, a producer and distributor of wine whose last name was Rege. Although the court in *Polygram* rejected the contention that comedy is categorically protected by the First Amendment, the court ruled that in light of the occasion at which the joke was delivered and the attending circumstances of the case, the joke, as a matter of law, was not defamatory. The court ruled that the threshold inquiry in cases of this sort is whether the communication in question could reasonably be understood in a defamatory sense by those who received it. *See*, Restatement (Second) of § Torts 563, com. C (1977).

> This is not to say that the discernibly humorous intent of the publisher is irrelevant, or that a court may not consider and give weight to the comedic context in which publication occurred, or the nature of audience response; for considerations of this sort invariably will bear upon the determination whether a defamatory meaning could reasonably be attached to the communication in question.

Polygram, *supra*, 170 Cal. App. 3d at 554, 216 Cal. Rptr. at 259. As set forth in this Court's analysis of the fact/opinion distinction, consideration of these same factors, including the circumstances, context and language of Rooney's broadcasts lead to the conclusion that, as a matter of law, his

statement's concerning Rain-X were not and are not defamatory.

As for any and all other statements made by Rooney in both his April 17 and May 8 broadcast which have not been specifically addressed, the Court does not find any of these statements to be actionable. The Court bases its findings on the fact that none of the other statements are both false and defamatory. In other words, those statements which could be characterized as objectively false, are not defamatory in that they do not tend to harm plaintiffs' reputation.

For instance, even if Rooney did not spend an hour applying Rain-X to his vehicles as he represented during his April 17 broadcast, the statement itself would not tend to harm plaintiffs' reputation. On May 8, Rooney talked about the fact that he was being sued for the comments he made regarding Rain-X in his April 17 broadcast. Referring to the first broadcast, Rooney states: "Well I said I tried it and it didn't work for me." Although Rooney did not use the words "for me" in his first broadcast, the inclusion of those two words in the May 8 broadcast does not rise to the level of making that particular statement defamatory.

Rooney also refers to the fact that "the fellow who makes this sent me a whole case of it" and "[t]his fellow sent me his product to evaluate, and I did." Indeed, Rooney was sent a sample package of Rain-X by Unelko. Unelko's National Sales Manager, Wayne Morrison, sent a letter to Rooney stating: "In order that you may personally test and evaluate RAIN-X performance, we have forwarded a small supply to you today via U.P.S." Although it is unclear exactly who sent the Rain-X to Rooney or for that matter the identity of "the fellow who makes" Rain-X, Rooney's statements are substantially true; he was sent the product by someone at

Unelko in order to personally test and evaluate. As noted previously, literal truth of a publication need not be established, only that the statement be substantially true in order for it to provide an absolute defense to an action for defamation.

As a result, neither the April 17 broadcast nor the May 8 broadcast contain any statements which are both defamatory and actionable at law. Therefore, defendants' motion for summary judgment is granted with respect to Counts 2 and 3 of the complaint which allege causes of action for defamation.

PRODUCT DISPARAGEMENT

Plaintiffs' first cause of action is based on product disparagement. This type of action is set forth in Restatement (Second) of Torts § 623A which is entitled "Liability for Publication of Injurious Falsehood." The particular form of injurious falsehood that involves disparagement of quality is commonly called "trade liable." An action for trade libel lies when the publisher disparages plaintiffs' property and should recognize that pecuniary loss from the conduct of third persons is the most likely result. Restatement (Second) of Torts § 626 (1977).

Product disparagement or injurious falsehood is subject to the same First Amendment requirements as is an action for defamation. Restatement (Second) of Torts § 623A, com. e (1977). In other words, an expression of mere opinion is no longer actionable unless it is found to imply the existence of undisclosed defamatory facts justifying the opinion. *Id.* This Court has ruled that Rooney's comments concerning Rain-X were not defamatory as a matter of law in that they constituted expressions of opinion not based on undisclosed

defamatory facts.[9] As a result, plaintiffs' failure to survive summary judgment on the defamation counts also precludes their recovery under a cause of action for product disparagement.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

As with plaintiffs' claim for product disparagement, plaintiffs' fourth cause of action based on tortious interference with business relationships must likewise fail. Plaintiffs allege its business relationships with other parties were interfered with as a result of Rooney's alleged defamatory comments. Since this Court has already ruled, however, that Rooney's comments were not defamatory but rather statements of opinion protected under the First Amendment, plaintiffs cannot maintain their claim for tortious interference.

In similar circumstances, the Ninth Circuit affirmed the dismissal of alternative of derivative causes of action based on plaintiffs' failure to state a claim for libel. *See Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 881 (9th Cir. 1988) ("Our holding that the Hustler article about Ault is constitutionally protected opinion forecloses her claims for libel, for invasion of privacy by placing her in a false light and for intentional infliction of emotional distress"). The same principle holds true under Arizona law. *See Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 636 P.2d 1257, 1262-63 (Ariz. App. 1981) (the defense of truth as a com-

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[9] The alleged undisclosed defamatory facts in this instance being that Rooney did not actually use Rain-X as he represented in his broadcast. The Court previously concluded that the record taken as a whole could not lead a rational trier of fact to find that Rooney did not use Rain-X.

plete defense to a charge of defamation is equally applicable to other causes of action based on the same libel claim).

IT IS ORDERED granting defendants' motion for summary judgment on all causes of action and plaintiffs' complaint and action are hereby dismissed.

DATED this 25th day of April, 1989.

Robert C. Broomfield
United States District Court

Copies to all counsel of record

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNELKO CORP., an Illinois corporation; HOWARD G. OHLHAUSEN,

Plaintiffs-Appellants,

v.

ANDY ROONEY, an individual; CBS, INC.,

Defendants-Appellees.

No. 89-15751

D.C. No. CV-88-0705-PHX-RC

ORDER

Before: ALARCON and POOLE, *Circuit Judges*, and HATTER, *District Judge**

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Alarcon and Poole have voted to reject the suggestion for a rehearing en banc and Judge Hatter so recommends.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED, NOVEMBER 20, 1990—CLERK, U.S. COURT OF APPEALS

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* Honorable Terry J. Hatter, United States District Judge for the Central District of California, sitting by designation.

Supreme Court, U.S.
FILED
MAR 21 1991
OFFICE OF THE CLERK

(2)

No. 90-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNELKO CORP., an Arizona corporation and HOWARD G. OHLHAUSEN, an individual,

Petitioners,

vs.

ANDY ROONEY, an individual, and CBS, INC., a New York Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ANDY ROONEY AND CBS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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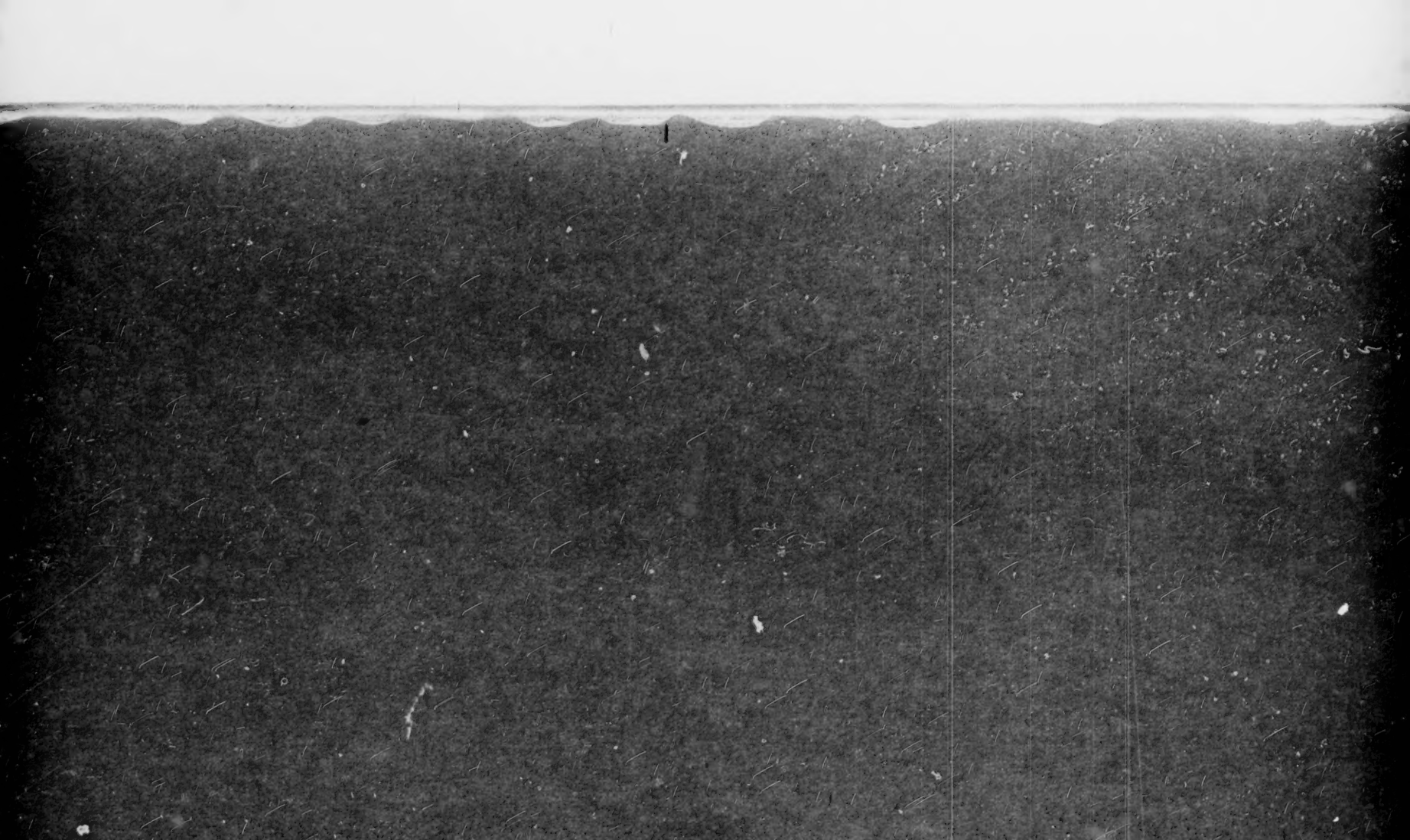

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS APPROPRIATELY AFFIRMED SUMMARY JUDGMENT DISMISSING PETITIONERS' COMPLAINT, WHERE THE COURT FOUND THAT PETITIONERS FAILED TO DEMONSTRATE THAT RESPONDENTS' STATEMENTS ABOUT PETITIONERS' PRODUCT WERE FALSE.

2. WHETHER THE COURT OF APPEALS APPROPRIATELY AFFIRMED THE DISTRICT COURT WHERE ONE OF THE TWO GROUNDS SUPPORTING THE DISTRICT COURT'S HOLDING WAS WARRANTED.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

SUBSIDIARIES AND AFFILIATED COMPANIES OF CBS INC.*
(as of 12/31/90)

	State or Country of Incorporation	Percent of Voting Shares Held by Immediate Controlling-Parent
Aspenfair Music, Inc.	California	100
Bala Cynwyd Associates [General Partnership]	Pennsylvania	50
Beverlyfax Music, Inc.	California	100
CBS Broadcast International of Canada Limited	Canada	100
CBS Broadcast Services Ltd.	England	100
CBS Pension Trustees U.K. Limited	England	100
CBS FMX Stereo Inc.	New York	100
CBS/FOX Company, The [General Partnership]	New York	50
CBS/FOX VIDEO (Holdings) Ltd.	England	10
CBS/FOX VIDEO Limited	England	100
CBS/FOX VIDEO (Germany) G.m.b.H.	Germany	100
CBS/FOX VIDEO (South Pacific) Pty Ltd.	Australia	100
CBS/FOX VIDEO (Canada) Ltd.	Canada	100
CBS/FOX VIDEO (Espanola) S.A.	Spain	100
CBS/FOX VIDEO French Film Licensing Corp.	New York	100
CBS/FOX VIDEO (France) S.A.	France	100

* Inactive subsidiaries are not included in this listing.

	State or Country of Incorporation	Percent of Voting Shares Held by Immediate Controlling-Parent
CBS/FOX VIDEO International S.A.R.L.	France	100
CBS/FOX VIDEO (New Zealand) Limited	New Zealand	99.99**
CBS/FOX VIDEO (Far East) K.K.	Japan	100
CBS Gramophone Records & Tapes (India) Ltd.***	India	40
CBS/MTM Company [General Partnership]	California	50
CBS News Special Projects Inc.	New York	100
CBS Overseas Inc.	New York	100
CBS Urban Renewal Corporation	New Jersey	100
Columbia Television, Inc.	New York	100
Galatea Productions, Inc.	Texas	100
Granite Holdings Inc.	New York	100
Katy Film Productions, Inc.	North Carolina	100
Meadowlands Parkway Associates [General Partnership]	New Jersey	50

** An additional .01 percent of voting shares is owned by CBS/FOX VIDEO (South Pacific) Pty. Ltd.

*** Subject to agreement of sale dated November 19, 1987 with Sony Corporation; awaiting deferred closing.

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No. 90-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNELKO CORP., an Arizona corporation and HOWARD G. OHLHAUSEN, an individual,

Petitioners,

vs.

ANDY ROONEY, an individual, and CBS, INC., a New York Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ANDY ROONEY AND CBS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Andy Rooney and CBS Inc. respectfully submit that the petition for a writ of certiorari should be denied, because the court of appeals correctly applied the applicable law, there is no conflict in the circuits requiring resolution, and Petitioners have raised no question of federal law that merits review.

Counterstatement of the Case

A. *Petitioners Misrepresent the Decision of the Ninth Circuit*

Petitioners Unelko Corp. and Howard G. Ohlhausen misrepresent the decision of the Ninth Circuit by arguing that the court failed to follow this Court's decision in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). To the contrary, the court of appeals carefully analyzed the allegedly defamatory statements in light of *Milkovich*, and concluded that the test for "opinion" applied by the district court was "obsolete" and the statements could not be protected on that basis. Nevertheless, the court of appeals also held that the statements were not actionable because Petitioners had failed to satisfy their burden of proof on the issue of falsity, one of the lynchpins of this Court's decision in *Milkovich*. *Id.* at 2706 (a separate privilege for "opinion" is unnecessary because sufficient safeguards for speech already exist, including the requirement that plaintiffs must demonstrate sufficient evidence of falsity to avoid summary judgment) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

B. *The Proceedings Below*

1. *The District Court*

During the April 17, 1988 broadcast of 60 MINUTES, Respondent Andy Rooney commented about junk mail that he received. One of the 13 items to which he referred was Petitioners' product, Rain-X: Rooney said he had tried it but it "didn't work." (The full text of the broadcast is set out in the Appendix at pages A-6-8; hereafter App. at ____).[1]

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[1] Rooney had received an unsolicited supply of Rain-X from Unelko following the *Arizona Republic*'s publication of his syndicated column entitled "RAIN," in which he reflected on his associations with rainy days. One of those musings concerned the need for larger windshield wipers to clean the entire windshield of his car. In response, Unelko wrote, saying that all he needed was "Rain-X," which it was forwarding so that he could "personally test and evaluate [its] performance . . ." (App. at A-5-6).

On May 4, 1988, Petitioner Ohlhausen and his company, Unelko Corp., filed a complaint in this diversity action against CBS Inc. and Rooney. Petitioners' complaint alleged defamation, product disparagement, and tortious interference with business relationships, based on statements made by CBS and Rooney in the 60 MINUTES broadcast. (Petition at 4; hereafter Pet. at ____). With respect to their defamation claim, Petitioners asserted that their product, Rain-X, was falsely portrayed by Respondents as not being efficacious and that everything Rooney said was false. (Pet. at 3).

On November 15, 1988, Petitioners were given leave to amend their complaint to include similar claims against Respondents, based on a 60 MINUTES segment that was broadcast on May 8, 1988 — four days after the filing of the complaint. (Pet. at 4; App. at A-10; the complete text of the second broadcast is set out at App. A-8-10).

On December 5, 1988, Respondents moved for summary judgment, which was granted on April 25, 1989. *Unelko Corp. v. Rooney*, 16 Media L. Rep. (BNA) 1737 (D. Ariz. 1989), *aff'd*, 912 F.2d 1049 (9th Cir. 1990). The court, applying Arizona law, held that summary judgment was appropriate because Petitioners had failed to demonstrate that any of Rooney's statements were substantially false. In addition, the district court held that Rooney's statements were opinion, and, therefore, absolutely protected. (App. at B-13-15).[2] Petitioners appealed from this ruling.

2. *The Court of Appeals*

The court of appeals, acting in light of *Milkovich v. Lorain Journal Co.* (which issued after the district court's decision and before oral argument in the appellate court), concluded that "the 'opinion' test applied by the district court [was] obsolete." Therefore, the court found "unwarranted" that portion of the

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[2] The court dismissed Petitioners' remaining claims on the ground that the defenses available to Respondents on the defamation claim were equally applicable to all other claims based on the same underlying statements. (App. at B-24-26).

district court's order which found that the complained of statements were constitutionally protected from liability as opinion. (App. at A-12).

However, the court of appeals recognized that it could affirm the district court "on any ground finding support in the record." (App. at A-12; citing *Jackson v. Southern Cal. Gas Co.*, 881 F. 2d 638, 643 (9th Cir. 1989)). *Accord*, *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Klingman v. Levinson*, 877 F.2d 1357, 1360 n.3 (7th Cir. 1989); *Railway Labor Executives' Ass'n v. Staten Island R.R. Corp.*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). Because the record was sufficiently developed to enable the court to determine whether Respondents' statements were statements of fact, and because Petitioners had submitted extensive evidence on the issue of falsity, the court applied the *Milkovich* analysis and searched the record to determine whether there was a triable issue of fact on the question of falsity. (App. at A-12).

Interpreting Arizona common law (App. at A-22) and applying the constitutional principles and standards for summary judgment established by this Court (App. at A-19-23), the court of appeals affirmed summary judgment on the ground that Petitioners had failed to meet their constitutionally required burden of demonstrating a factual issue with respect to whether any of Respondents' statements were substantially false. (App. at A-22-23).

The court concluded, as had the district court, that the evidence submitted on falsity was inferential and ambiguous at best and that no reasonable jury could render a verdict on behalf of Petitioners. (App. at A-21-23).[3]

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[3] The court of appeals affirmed the decision of the district court dismissing Petitioners' remaining claims on the ground that they could not be sustained where they were predicated on the same facts as a failed defamation claim. (App. at A-23).

The only issue before this Court is whether the Court should review the court of appeals' affirmance of the district court's dismissal of Petitioners' defamation claim.[4]

Summary of Argument

A writ of certiorari should "be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Petitioners offer no such reasons.

Petitioners' assertion that the Ninth Circuit repudiated this Court's decision in *Milkovich* mischaracterizes the decision below. Indeed, to the contrary, the court of appeals scrupulously adhered to that decision and other applicable precedents of this Court and fully explained its conclusion in light of those decisions.

Petitioners' other argument, that *Milkovich* required the Ninth Circuit to remand, is equally misplaced. After appropriately reviewing the record *de novo*, the court rejected the district court's holding on opinion and affirmed the lower court on its alternative ground that Petitioners failed to present sufficient evidence to raise a factual issue on the question of falsity.

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[4] Petitioners present no arguments in the petition regarding their claims of product disparagement and tortious interference with business relationships. Neither claim raises any novel issues of constitutional or federal law.

Reasons for Denying the Writ

I. THE NINTH CIRCUIT CORRECTLY REVIEWED THE RECORD AND AFFIRMED SUMMARY JUDGMENT ON THE GROUND THAT PETITIONERS FAILED TO RAISE A TRIABLE ISSUE OF FACT ON THE QUESTION OF FALSITY.

Petitioners miss the the thrust of the Ninth Circuit's ultimate conclusion: in a case involving a matter of public concern (here, speech about product effectiveness), the Constitution requires Petitioners to come forward with sufficient proof to create a triable issue of fact on the question of falsity.[5] (App. at A-19-20; citing *Milkovich*, 110 S. Ct. at 2704 and 2706); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)); *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 481, 724 P.2d 562, 567 (1986); *Phoenix Newspapers, Inc. v. Church*, 103 Ariz. 582, 596-97, 447 P.2d 840, 854-55 (1968), *cert. denied*, 394 U.S. 959 (1969). Petitioners failed in this effort. (App. at A-22-23).

The question of falsity lies at the heart of both the decision of the court of appeals and the district court. Petitioners have always claimed that Respondents' statements were replete with falsehoods and, therefore, actionable. (Pet. at 3; App. at A-18). However, Petitioners' failure to produce adequate evidence of falsity formed the basis for the Ninth Circuit's affirmance of the district court. This conclusion is fully in accord with *Milkovich* as well as *Hepps* and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Accordingly, Petitioners' argument that the Ninth Circuit repudiated *Milkovich* simply reflects a misreading of the decision below. There is no reason for this Court to grant the Petition on this basis.

Petitioners assert that the court of appeals' "misapplication" of *Milkovich* led to an analysis of Rooney's after-the-fact stated

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[5] The petition does not address this issue at all.

intent, rather than an analysis of the statements made. (Pet. at 11-12). This ruling, they argue, "eviscerated" *Milkovich*, and deprived them of a jury trial to determine if the statements were defamatory. (Pet. at 12). They urge that remand was required because their discovery efforts were undertaken in light of law that had been reversed. (Pet. at 13-15). Petitioners even suggest that their Seventh Amendment right to a jury trial may be impaired if the decision is allowed to stand. (Pet. at 3, 12-15).[6]

Not only do these arguments ignore the Ninth Circuit's circumspect application of *Milkovich*, but also they ignore the fact that Petitioners' entire case was designed to demonstrate that Respondents' statements were false. (Pet. at 3, n.4; App. at A-3-4 and 20-23; B-6-13).[7] Petitioners even submitted supposed experimental test evidence, which they urged demonstrated that Rain-X worked. (App. at A-3-4 and 20-22; B-6-8 and 11-13).[8] It was this evidence the court of appeals reviewed in connection with Petitioners' contention that they had raised a triable issue of fact. (App. at A-20-23). It was this evidence which formed the basis for the conclusion that summary judgment was warranted.

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[6] Petitioners assert that the only basis for the district court's decision was that Rooney's statement was protected opinion (Pet. at 5-6), and that once a court determines that a statement contains an objectively verifiable statement of fact, it is automatically actionable. (Pet. at 10). Thus, they argue that because viewers could interpret Respondents' statements to mean that their product does not work, the failure of the Ninth Circuit to consider the impact of this statement on jurors implicated their Seventh Amendment rights and requires remand. (Pet. at 12-15).

[7] The petition even lists some of these challenges: that Rooney had not taken an hour to apply it (Pet. at 3, n.4; App. at A-4 and 21; B-7 and 9-11); that Rooney changed his testimony about which car he applied it to (Pet. at 3, n.4); and that Rooney could not remember exactly when he had applied it (Pet. at 3, n. 4; App. at A-4 and 21; B-7 and 9).

[8] Petitioners also took the depositions of Rooney; his wife, Marguerite Rooney; 60 MINUTES Executive Producer, Don Hewitt; and the producer of Rooney's weekly segment, Jane Bradford.

Moreover, Petitioners also misperceive the role of the court and ignore the "integral part" which summary judgment plays in the federal judicial system. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). To avoid summary judgment, Petitioners were required to "set forth specific facts showing that there [was] a genuine issue [of fact] for trial." (App. at A-19; citing *Anderson*, 477 U.S. at 250). Reviewing the grant of summary judgment *de novo*, as it was required to do under Fed. R. Civ. P. 56 (App. at A-10; citing *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir.), *cert. denied*, 110 S. Ct. 59 (1989)),[9] the Ninth Circuit applied *Anderson v. Liberty Lobby* and agreed with the district court's conclusion that no reasonable jury could conclude that Petitioners had met their "burden of proving falsity by a preponderance of the evidence." (App. at A-22).[10] The court found that the proffered evidence was ambiguous at best and, therefore, failed to meet the constitutional standard established by *Hepps*. (App. at A-22).[11]

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[9] *Cf.*, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (in a case of constitutional significance the court is required to search the record).

[10] "[T]he question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not." (App. at A-22; citing *Anderson*, 477 U.S. at 254 (emphasis in original)).

[11] The district court had noted that Petitioners "concede that Rooney could have used Rain-X in an improper manner [and] never directly contend that Rooney is lying or attempting to fabricate a cover story when Rooney states he applied Rain-X to the windshield of his car." (App. at B-8).

The court of appeals also found that: (1) Rooney's deposition testimony revealed "familiarity with Rain-X's properties when applied"; (2) no evidence had been offered to demonstrate "that traces of Rain-X on Rooney's vehicles would survive a Connecticut winter" and that Petitioners' literature stated that Rain-X's longevity "is dependent upon such factors as environment, climate, and time of year"; (3) contrary to Petitioners' assertions, Marguerite Rooney's testimony (which was offered by Petitioners) supported Rooney's deposition testimony that "he used Rain-X"; and (4) the experimental evidence

(Footnote continued)

Finally, relying on Arizona common law for the proposition that substantial truth, not literal truth, protects a statement from a claim of defamation (App. at A-22; citing *Fendler v. Phoenix Newspapers Inc.*, 130 Ariz. 475, 636 P.2d 1257 (Ct. App. 1981)), the court held that Petitioners' evidence failed to prove that any of Respondents' statements were "false in substance and thus was not sufficient to avoid summary judgment." (App. at A-22-23).

In this light, certiorari would be improvident. The court of appeals did not act on an empty record, nor did it fail to follow established law. Although the district court had granted summary judgment on both grounds, the court of appeals properly reviewed that decision in light of *Milkovich*, concluding that even if the statements were not deserving of protection as opinion, Petitioners had not demonstrated a triable issue on the question of falsity and summary judgment was constitutionally mandated, as *Hepps* requires.

The conclusion of the court of appeals should not be disturbed.

II. THE NINTH CIRCUIT SCRUPULOUSLY APPLIED THIS COURT'S DECISION IN *MILKOVICH v. LORAIN JOURNAL CO.*

The Ninth Circuit properly recognized that the "significant body of Ninth Circuit case law" granting absolute protection for statements of opinion, relied upon by the district court, had been "effectively overruled by the Supreme Court's recent opinion in *Milkovich v. Lorain Journal Co.*" (App. at A-11). Accordingly, the court held that the district court's conclusion that Respondents' statements enjoyed unqualified First Amendment protection was "unwarranted." (App. at A-12).

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offered by Petitioners was inadmissible due to a lack of foundation showing that the test was conducted under circumstances similar to the conditions under which Rooney had tried Rain-X. (App. at A-21-22). As stated by the district court, "It does not take the testimony of Willard Scott for this Court to take judicial notice of the fact that climatic conditions in Connecticut where Rooney resides are vastly different from those in the Phoenix area where the Unelko control vehicle was tested." (App. at B-12).

Although this Court declined to recognize a separate constitutional privilege for opinion in *Milkovich*, that decision did not dilute any of the established constitutional protections for speech. Among those safeguards, and especially relevant here, is that "'when a plaintiff seeks damages against a media defendant for speech of public concern,[12] [there is a] constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.'" *Milkovich*, at 2704; citing *Hepps*, 475 U.S. at 776.[13] The court of appeals, following *Milkovich* and *Hepps*, concluded that the district court's holding on falsity should be affirmed. (App. A-18-22).

Notwithstanding Petitioners' argument that the court of appeals ignored *Milkovich*, the opinion reveals otherwise. In finding that Rooney's conclusion that Rain-X "didn't work" could be construed as a statement of fact, the court looked at three factors:

> (1) whether Rooney used figurative or hyperbolic language that would negate the impression that he was seriously maintaining that Rain-X did not perform effectively; (2) whether the general tenor of Rooney's segment of "60 Minutes" negated this impression; and (3) whether the assertion that a product works is susceptible of being proved true or false.

(App. at A-13; citing *Milkovich* at 2697).

Applying this test, the court concluded that:

(1) although Rooney's remarks about other items he had received in the mail were characterized by hyperbole, his statements about Rain-X were not couched in "loose, figurative, or hyperbolic language," and could produce the factual

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[12] "[P]rotection of statements about product effectiveness will 'ensure that "debate on public issues [will] be uninhibited, robust and wide-open."'" (App. at A-20; citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[13] The petition does not raise any question regarding this issue.

impression that Rain-X failed to perform as promised. (App. at A-14).

(2) although the overall tenor of Rooney's remarks were humorous and satirical, and his viewers realize they are getting Rooney's opinions, his statements about Rain-X reasonably could be viewed as factual. (App. at A-14-15).

(3) Rooney's observations about Rain-X performance were not so dependent on subjective evaluation as to be incapable of being objectively verified, *i.e.*, proved true or false. (App. at A-15-18).

Thus, the court of appeals found no protection for Respondents "under the standard established in *Milkovich*" and concluded that "the propriety of the district court's grant of summary judgment depend[ed] on whether [Petitioners] created a triable issue of fact as to the falsity of Rooney's statements." (App. at A-18).

Petitioners ignore this analysis, arguing that the court of appeals "rejected" or "violated" or "repudiated" *Milkovich* by affirming the district court. (Pet. at 7-12). These meritless arguments display a complete misreading and misunderstanding of the court of appeals' decision.

The court of appeals correctly followed established precedent of this Court and Petitioners' request for review should be denied.

III. THE NINTH CIRCUIT CORRECTLY RETAINED JURISDICTION BECAUSE THE RECORD WAS SUFFICIENTLY DEVELOPED TO AFFIRM THE DISTRICT COURT ON ONE OF THE TWO THEORIES FORMING THE BASIS OF ITS DECISION.

Petitioners contend that the Ninth Circuit was limited to finding that opinion was not a defense and summary judgment was therefore inappropriate. However, an intervening change in the law does not limit appellate review where there are sufficient

grounds to uphold a district court's decision on an alternative theory. *Heimbach v. Chu*, 744 F.2d 11, 13 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (where the decision of a lower court is correct, "it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason")); *see also Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Fidelity Fin. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1437 (9th Cir. 1986.) ("We may affirm the district court on a ground not selected by the district judge so long as the record fairly supports such an alternative disposition of the issue."), *cert. denied*, 479 U.S. 1064 (1987).

Affirming on an alternative ground is particularly appropriate here because the parties had an opportunity to brief and argue that alternative theory at length. (App. at A-15-23, B-5-13). Accordingly, where, as here, a party has failed to make a showing "sufficient to establish the existence of an element essential to that party's case," summary judgment is mandated. (App. at A-19; citing *Celotex*, 477 U.S. at 322).[14]

The assertion that remand was required is without merit.

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[14] Petitioners' reliance on *Heirs of Fruge v. Blood Servs.*, 506 F. 2d 841 (5th Cir. 1975), is misplaced because the court there was limited to the one issue raised by the motion for summary judgment, charitable immunity. Here, there is no question that the record on both the questions of falsity and opinion were well developed and addressed by the district court. (App. at A-12-23 and B-5-24).

CONCLUSION

For the foregoing reasons, Respondents Andy Rooney and CBS Inc. respectfully request that the Court deny the petition for a writ of certiorari.

Dated: New York, New York
March 22, 1991

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States provides in pertinent part that: "Congress shall make no law. . . abridging the freedom of speech, or of the press. . . ."

COURT RULES

Federal Rule of Civil Procedure 56(b) provides: "*For Defending Party*. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

Federal Rule of Civil Procedure 56(c) provides in pertinent part that: "*Motion and Proceedings Thereon*. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

Supreme Court, U.S.
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No. 90-1325

Supreme Court of the United States

OCTOBER TERM, 1990

UNELKO CORP., an Arizona corporation, and HOWARD G. OHLHAUSEN, an individual,

Petitioners,

v.

ANDY ROONEY, an individual, and CBS, INC., a New York Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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The CBS/Rooney Brief Begs The Question As To Which Of The Defamatory Implications Of Rooney's Statement Is To Be Judged True Or False Under *Milkovich.*

The CBS/Rooney brief fails to address the dispositive inquiry mandated by *Milkovich.*[1] Under *Milkovich*, the

* Unelko Corp. is a privately owned Arizona corporation which has no parent or subsidiary company.

[1] *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990).

proper inquiry in a defamation case is whether a reasonable fact finder can conclude that a statement implies a false assertion of objectively verifiable facts.[2] Reasonable fact finders—specifically, the trial court and viewers who wrote to CBS/Rooney—have already concluded that Rooney's false statement that Rain-X "didn't work" implied that Rain-X "*does* not work." The trial court found that Rooney's statement constituted a "pronouncement . . . that [Rain-X] does not work."[3] Numerous viewers understood Rooney's statement to imply that Rain-X "does not work," and responded to this defamatory assertion by emphatically telling CBS and Rooney that Rain-X does indeed work.[4]

Nevertheless, the CBS/Rooney brief ignores this reasonable implication of Rooney's statement (i.e., that Rain-X does not work). Instead, the CBS/Rooney brief focuses exclusively on Rooney's subjective, after-the-fact and self-serving assertion that he only meant that Rain-X "did not work *for him.*" CBS/Rooney argue in their brief that the evidence of record fails to demonstrate the falsity of this latter proposition. What CBS/Rooney completely ignore is that *no* record was developed on the defamatory pronouncement that Rain-X "does not work." Indeed, the record that was partially developed focused exclusively on whether Rooney properly applied Rain-X.

Under *Milkovich*, the inquiry focuses on the falsity of Rooney's pronouncement that Rain-X does not work. The Ninth Circuit recognized that this assertion is capable of being proved false. It noted: "Whether Rain-X repels rain, facilitates window cleaning, and increases visibility are all

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[2] *Id.* at 2705.

[3] Pet. App. B-1 (April 25, 1989, Order of Judge Broomfield).

[4] Petition at 11, n.25.

capable of being proved true or false. Each determination rests on 'a core of objective evidence.'"[5] Unfortunately, this objective evidence that Rain-X "does work" became relevant only after *Milkovich*, and no factual record had been or was allowed to be developed on this issue. Thus, the Ninth Circuit's improvident refusal to remand the case deprived Petitioners of the opportunity to develop and present this critical evidence.

Consequently, Petitioners respectfully request that this Court exercise its power of supervision and grant their Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED, this 29th day of March 1991.

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[5] *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1055 (9th Cir. 1990) (*citing Milkovich*, 110 S. Ct. at 2707).